JUL 15 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 304

SOUTHERN BLOWPIPE & ROOFING COMPANY
and E. J. HOPTON,
Petitioners,

v.

CHATTANOOGA GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 17, 1968.

OPINIONS BELOW

The Memorandum on Motion for Summary Judgment filed by the District Court on October 27, 1964 (Appendix, p. 7) is unreported.

The opinion of the Court of Appeals dated May 6, 1966 (Appendix, p. 12) is published at 360 F. 2d 79. No opinions have been written by the District Court or the Court of Appeals since that date.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 17, 1968 (Appendix, p. 21). The petition for rehearing was denied on May 10, 1968 (Appendix, p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

May a public utility already possessed of a legal monopoly enter into a separate relevant market, normally competitive, and sell below cost in this separate market where the purpose is to expand its primary (and legally monopolized) market?

STATUTES INVOLVED

15 U.S.C. § 2, the Sherman Act, reads as follows:

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

STATEMENT OF THE CASE

This suit was filed on January 7, 1964, as a class action on behalf of "the sellers and installers of gas equipment and appliances in the Chattanooga area." It was dismissed by the District Court on motion for summary judgment *because there was no specific intent* to create a monopoly (Appendix, p. 7).

The Court of Appeals reversed and sent the case back for trial, stating:

> "Notwithstanding the many cases that have treated the subject of anti-trust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the pecularities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the anti-trust laws." (Appendix, p. 16)

Upon remand the complaint was amended so as to confine the class to those engaged in the business of "selling, installing and servicing heating and air conditioning systems," and an additional plaintiff, who sold, installed, and serviced coin-operated laundries, was added.

The Trial Court, in the pretrial order (paragraph 5(a), Appendix, p. 18), posed the legal question presented here, quoting from the Court of Appeals opinion. Without opinion, the Trial Court ruled adversely to the plaintiffs on this legal question, both at the close of the plaintiffs' proof when one plaintiff was dismissed by the Court, and at the close of all the proof, when the plaintiffs' motion for a directed verdict was denied.

The Court instructed the jury that "the defendant, Chattanooga Gas Company, has of course, a lawful monopoly in the sale and distribution of natural gas in the Chattanooga area" (Appendix, p. 28), and then instructed the jury that this monopoly was not in violation of the law. In continuing the instruction the Court defined "monopolize" as "the existence of a monopoly power coupled with the intent to use it for anti-competitive or monopolistic purposes," and "monopolizing means to acquire or to maintain the power to exclude . . . competition . . . accompanied with the intent or purpose to exercise that power. In other words, both elements must be found to exist" (Appendix, p. 28-29).

When the jury returned and asked the Court to "better define an attempt to monopolize," the Court told the jury that "the defendant must have been shown to have had the specific intent to monopolize" (Appendix, p. 29). The foreman then asked clearly "could they be guilty without intent?", and the Court repeated: "They could not be guilty of attempting to do that unless they had, from a preponderance of the evidence it was shown that they intended to do just that" (Appendix, p. 30-32).

After a verdict for the defendant was returned, and a judgment entered, the plaintiffs filed a Motion for a Judgment Notwithstanding Verdict and for an Immediate Injunction, based upon the fact that the Chattanooga Gas Company was a monopoly and should be enjoined from operating in the plaintiffs' relevant markets (Appendix, p. 22). The District Court denied the motion without opinion on March 20, 1967 (Appendix, p. 23).

On appeal the first question set out in the plaintiffs-appellants' briefs was:

"Can a privately owned gas distribution company, operating as a monopoly under State law, extend its monopoly by invading the contracting business for the purpose of promoting the sale of gas, and operate this contracting business at a loss, to the damage of the contractors already in the contracting business?"

Without opinion, the Court of Appeals affirmed the District Court and denied a petition for rehearing (Appendix, p. 24).

REASONS FOR GRANTING THE WRIT

This is a class action, and presented to the Courts below a question of national importance (see material in the Appendix regarding national importance of the question, pp. 33-43). The Courts below, without opinion, found that a monopoly can legally operate in a competitive field provided there is no intent to specifically drive out competitors—these Courts held, by their inaction and approval of a jury verdict on the charge as given, that specific intent was absolutely necessary to a case under Section 2 of the Sherman Act regardless of ability to monopolize; and that a "franchised monopoly" was *not* a monopoly *per se* when operating outside its franchised market.

The results of such a policy are plain to see. In the present case, by the testimony of the defendant's own witness, out of three hundred new home installations in 1966, one hundred and forty were done by the defendant Gas Company and 95% of the remainder were "developed and pushed out" to contractors by the Gas Company—better than 97% of this market was controlled by the Gas Company (Testimony of E. J. Prince, page 504-505 of transcript, p. 26 of Appendix hereto). The Courts have, in this case, held that this does not violate the Sherman Act because the in-

tent is to sell gas. The fact that the Gas Company lost about $650,000 in the relevant market over a ten year period should indicate some measure of the damage done to the plaintiffs, named and unnamed.

CONCLUSION

As set out above, it is vital to the future administration of the antitrust laws that some guidance be given the Courts in this new field. The opinion of the Court of Appeals indicated that "the applicable rule of law should be designed after trial." The case has been tried, but no rule of law has been formed, unless we assume that specific intent is required even where a monopoly power actually exists. This should not be allowed to stand as a rule of law, and it is respectfully urged that this petition should be granted so that the reasons may be fully set out for this Court.

Respectfully submitted,

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Attorney for Petitioner.

Of Counsel:

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MEMORANDUM ON MOTIONS FOR SUMMARY JUDGMENT

(Filed October 27, 1964)

In this class action it is set out that the named and unnamed plaintiffs are engaged in the business of selling appliances for the utilization of natural gas. The defendant, under a state franchise, has a legal monopoly to distribute natural gas in the Chattanooga area. It also sells gas appliances.

The claim of merit for relief made by the named plaintiff is under Sections 1 and 2 of the Sherman Act [15 U.S.C.A. Sections 1 and 2] and the right to maintain the action for threefold damages is based upon Section 15 of the Clayton Act [15 U.S.C.A. Section 15].

The defendant has interposed a motion for summary judgment. The named plaintiff has filed a motion for summary judgment as to liability and asked for a mandatory injunction to issue restraining the defendant from continuing the conduct charged against it.

The record upon which decision must be made, in addition to the pleadings, are: (1) Affidavit of Edward F. Davis, Sales Manager for the defendant and (2) discovery depositions taken by the plaintiff of John Inman Kidd, Secretary-Treasurer of the defendant, S. V. O'Lenic, President of defendant, and Edward F. Davis, the same person who made the affidavit.

The named plaintiff pitches its right for relief upon the proposition that the defendant is selling and servicing gas appliances below cost so as to render fair competition by the plaintiff and those similarly situated impossible and that the defendant's activities in this respect amount to an attempt to create a monopoly.

From reading all the evidence submitted in connection with the motions, there is some difficulty in determining whether there are factual questions in dispute. It will be assumed that the defendant is selling appliances at cost or cheaper and that such may unfavorably interfere with the sales by plaintiff and those similarly situated. Even so, has the defendant actually violated the parts of the anti-trust law set out as the bases of this action?

Sections 1 and 2 of the Sherman Act provide, in substance, that:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor. * * *"
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

With regard to cases arising under Section 1 of the Sherman Act, as is set out above, suffice it to say that these cases may pose at least four main issues: (1) What proof suffices to establish that "contract, combination in the form of trust or otherwise, or conspiracy" which Section requires? (2) Does the conduct reviewed sufficiently effect "trade or commerce among the several states * * *?" (3) In what market is the effect of the challenged arrangement to be tested and what evidence is relevant in establishing that market? (4) In what relevant market does

the challenged conduct "unduly" restrain competition? Of course, there are a variety of devices which constitute unreasonable restraints under Section 1. These devices are generally divided into restraints fixing prices either directly or by controlling production and those devices which "unduly" restrain competitive opportunity or commercial freedom. Examples of the latter would be permanent combinations through mergers or vertical integration, trying arrangements conditioning the sale or lease of one product on the use of another, collective refusals to deal, forced use of standard contracts, market division among competitors, and dealership systems where there is allocated to each dealer certain exclusive privileges for a prescribed territory. Obviously, the fact situation in this case is such that it does not conform with any of the devices that constitute a violation of Section 1 of the Sherman Act. A bibliography of anti-trust cases dealing with violations of Section 1 of the Sherman Act is set out in the margin.[1]

Section 2 establishes three separate offenses which are as follows: (1) To monopolize; (2) to attempt to monopolize; and (3) to conspire with any other person to monopolize.

---

[1] Dr. Miles Co. v. John D. Parks & Son Co., 220 U. S. 373;
Standard Oil of New Jersey v. United States, 221 U. S. 1;
United States v. American Tobacco Co., 221 U. S. 106;
Eastern States Retail Lumber Dealers Assn. v. United States, 234 U. S. 600;
Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441;
United States v. Trenton Potteries Co., 273 U. S. 392;
United States v. First National Pictures, Inc., 282 U. S. 44;
United States v. Colgate & Co., 250 U. S. 300;
United States v. Bausch & Lomb Optical Co., 321 U. S. 797;
International Salt Co., Inc. v. United States, 332 U. S. 392;
United States v. Columbia Steel Co., 334 U. S. 495.

The complaint especially points out that the conduct of the defendant "tends to create a monopoly." Therefore, the basic claim of the named plaintiff concerns that part of Section 2 which prohibits the attempt to monopolize. The attempt to monopolize is distinguished from the act of monopolization in that it is not necessary for the plaintiff to show that the desired end of monopoly of power was attained. However, in all such cases to date, attempts to monopolize, where the monopoly power was not achieved, there is an additional element necessary to be shown before there can be found a violation. That element is sometimes called "specific intent" or sometimes called "subjective intent to accomplish an unlawful result." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627; *Mackey v. Sears, Roebuck & Co.*, 237 F. 2d 869, 873, certiorari dismissed 355 U.S. 885; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 431-432; *American Tobacco Co. v. United States*, 328 U.S. 781, 814.

There is a firm conclusion upon undisputed evidence that the defendant sells gas appliances only for the purpose of promoting the sale of natural gas which is its real business. The defendant has strong competition for the sale of its natural gas from the sale and distribution of electric energy by a publicly owned electric power distributor. The electric energy and the natural gas are generally utilized for the same purposes.

The record makes it clear that the defendant would be very happy to be out of the gas appliance business if the private dealers would use extraordinary effort to sell gas appliances. To accomplish this end, the defendant has offered to the private gas appliance dealers certain inducements. Of course, on the other hand, the private businesses selling gas and electrical applicances have no

reason to try to induce people to use gas rather than to use electricity.

The uncontradicted proof reveals that the defendant has no intention to attempt to monopolize the sale of gas appliances in this area. If the plaintiff and others similarly situated are entitled to relief of some kind against the defendant, it is not under Sections 1 and 2 of the Sherman Act.

The motion for summary judgment made by the plaintiff is denied.

The motion for summary judgment interposed by the defendant is granted.

Order accordingly.

Leslie R. Darr,

United States District Judge (Rt.)

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

NO. 16,327

SOUTHERN BLOWPIPE & ROOFING CO.,
Plaintiff-Appellant,

v.

CHATTANOOGA GAS COMPANY,
Defendant-Appellee.

APPEAL from the District Court for the Eastern District of Tennessee

OPINION

Decided May 6, 1966

Before WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This cause presents the appeal of plaintiff-appellant, Southern Blowpipe & Roofing

Company, from the entry of a summary judgment in favor of defendant-appellee, Chattanooga Gas Company, in the United States District Court for the Eastern District of Tennessee, Southern Division. Appellant sells and installs gas equipment and appliances in the area of Chattanooga, Tennessee. Its complaint purports to assert a cause of action for itself and on behalf of other sellers and installers of gas equipment and appliances in the Chattanooga area. Appellee is a public utility with an exclusive franchise to supply gas to consumers in the same area. Appellant's complaint avers that appellee utility competes with it, and other Chattanooga installers and dealers, in the sale and installation of appliances and equipment used in the consumption of gas supplied by the utility. It charged that in methods of sale, service and installation of gas equipment and appliances, the Gas Company has been guilty of violating the Sherman Anti-Trust Act, 15 U.S.C. Sections 1 and 2.

The District Judge heard the matter upon competing motions for summary judgment, having before him an affidavit supporting defendant's motion, and also the discovery depositions of defendant utility's representatives. Appellant offered no affidavit or other evidentiary opposition to the factual content of defendant's affidavit and the depositions. The District Judge concluded that the undisputed facts failed, as a matter of fact and law, to expose any violation of the Sherman Act by appellee-defendant.

The District Judge's opinion appears to assume that the total thrust of appellant's complaint was that appellee Gas Company was involved in an "attempt to monopolize." He concludes that the undisputed facts as set out in the

defendant's affidavit and the discovery depositions disclose that the Gas Company's conduct could not be viewed as a deliberate attempt to create a monopoly. These facts, however, do not negative an inference that what the Gas Company was doing could, and very probably would, inevitably result in the Gas Company obtaining a monopoly on the sale of all appliances using gas as a source of power. The Gas Company deponents testified that its primary objective was to multiply the number of users of gas; in this effort the Gas Company was opposed by strong competition from TVA electric power; that before it could sell its gas it had to persuade prospective consumers of the economic advantage of gas and an initial consideration of a prospective user was the cost of acquiring and installing the gas consuming appliance. To gain the custom of such users, the Gas Company offers appliances to them at less than its own cost of acquisition and installation. Appellee's sales manager stated "the company does make a profit on more than 90% of its sales, *aside from promotional expenses*." (Emphasis added.) It is clear, however, that had a proper share of this "promotional expense" been charged to the sale and installation of appliances, it would demonstrate that the customer acquires his appliance for less than the Gas Company's cost. This loss, however, is recouped, we assume, when the Gas Company's rates are set on the basis of its total costs, including the "promotional expense."

The District Judge assumes the foregoing by his recital, "It will be assumed that the defendant is selling appliances at cost or cheaper and that such may unfavorably interfere with the sales by plaintiff and those similarly situated." There can be no quarrel with the District Judge's factual conclusion that the Gas Company did not enter or continue

its program for the purpose of monopolizing the gas appliance market. Its clear purpose is to multiply the users of its gas; it had sought to help and encourage others to sell gas appliances and had given certain free service to customers regardless of the source of their original acquisition of the gas installations.

The District Judge summarily disposed of the case entirely upon a view that the pleadings and depositions made it undisputed that the Gas Company was not attempting to monopolize and that it had not yet acquired monopoly power. He stated, relevant to attempts to monopolize, "However, in all such cases to date, attempts to monopolize *where the monopoly power was not achieved*, there is an additional element necessary to be shown before there can be found a violation. That element is sometimes called a 'specific intent' or sometimes called 'subjective intent to accomplish an unlawful result'. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-627; *Mackey v. Sears, Roebuck & Co.*, 237 F(2) 869, 873, cert. dismissed, 355 U.S. 865; *United States v. Aluminum Co. of America*, 148 F(2) 416, 431-432; *American Tobacco Co. v. United States*, 328 U.S. 781, 814." (Emphasis supplied.)

Appellant's complaint, although leaving much to be desired as a clear portrayal of its position, did not charge merely that defendant was attempting to monopolize. It charged, inter alia, that,

> "The defendant * * * sells and installs such appliances and equipment at prices and on terms below the cost of selling and installing them *rendering competition* in the sales, installation and servicing of such appli-

ances and equipment *impossible*. In addition, the defendant is the distributor in this area for Arkla-Servel gas heating and cooling equipment, and supplies it directly to consumers at less than cost or at no charge or on such terms *as are unfair and below cost*." (Emphasis supplied.)

We believe that such allegations can be read as a charge that the defendant has already acquired a monopoly or monopoly power. Whether the proofs will sustain such a claim will depend on further evidence to be developed upon a trial. Notwithstanding the many cases that have treated the subject of anti-trust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the peculiarities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the anti-trust laws. We may also have the question of what is the relevant market in which the Gas Company and the plaintiff, and others in the appliance business, are competing and whether the defendant has, for all practical purposes, already acquired a monopoly in that market. Whether the evidence to be examined will expose such questions in the case before us can only be determined upon a trial, the limits of which can be set by the trial court. We do not now intimate a view one way or the other on the legality of the hypothesized conduct of defendant, should it be factually established, "for we believe that the applicable rule of law should be designed after trial." *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963). Under Rule 56(c) Fed. R. Civ. P., summary judgment requires not only that there be no dis-

puted facts, but that "the moving party is entitled to a judgment as a matter of law." Notwithstanding the salutary and timesaving uses of summary judgment, Judge Miller of this court took occasion to speak at some length of the restraints that should be observed in its use. *S. J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F(2) 235, 237 (CA 6, 1963). Sparing employment of it in the complex field of the anti-trust statutes was admonished by the Supreme Court in *Paller v. Columbia Broadcasting Co.*, 368 U.S. 464, 467, 473 (1962) and *White Motor Co. v. United States*, 372 U.S. 253, 259-264 (1963).

The judgment is reversed and the case remanded for further proceedings consistent herewith.

[Caption Omitted]

PRETRIAL ORDER

(Filed February 23, 1967)

* * *

(5) CONTESTED ISSUES OF LAW: The contested issues of law, in addition to those implicit in the foregoing issues of fact, are:

(a) An issue of law exists with respect to whether the activities of the defendant complained of by the plaintiffs would constitute a per se antitrust violation or would be subject to the test of reasonableness. The Court of Appeals in its opinion stated at page 4:

> ". . . Notwithstanding the many cases that have treated the subject of antitrust practices, we have been cited to none that deal with the question of whether a utility already possessed of a legal monopoly may, in the service of that monopoly, avail itself of the peculiarities of utility rate-making to sell below cost in an underlying field of competition. No case has considered whether a subsidiary monopoly thus obtained offends the antitrust laws. . ."

* * *

EXCERPTS FROM COURT'S CHARGE

* * *

or his property proximately caused by one or more of the violations of the Federal Anti-Trust laws by the defendant and as alleged by the plaintiff. You will not treble that amount nor will you include any sum for the costs of the suit nor will you include any sum for reasonable attorney's fee, since it is the function and the duty of the Court under the laws to assess those amounts in the event that the jury returns a verdict in favor of the plaintiff in a suit of this nature. In other words, the sole function of the jury in this type of litigation in the matter of assessing damage is to assess actual damage sustained by the plaintiff as a direct and proximate result of the violations of the [571] Anti-Trust Laws and not to treble that damage nor to assess costs nor to assess attorneys' fees, for the responsibility of doing those acts being imposed by law upon the Court after the jury has returned its verdict.

Now, are there any special requests, gentlemen?

* * *

[Charge requested by plaintiff as a special request; see page 571 of record.]

One who reduces his price to below his own cost on a consistent basis, or operates in a field of endeavor with the intention of sustaining a loss, violates the Sherman Act.

Civ. 4238 Declined. F.W.W.

* * *

Anything further?

Gentlemen, I have prepared for your use a general ver-

dict form. I think it's a very simple verdict form, very clearly understandable. Let me just go over it with you and then after you have retired to consider your verdict, you will want to go over it further. You are asked to respond in this case to three issues. The first issue is as follows:

We, the jury, find the plaintiff, Southern Blowpipe and Roofing Company (and there is a blank for you to fill in your verdict—either is or is not) entitled to recover of the defendant, Chattanooga Gas Company, for a monopolization in violation of the Sherman Anti-Trust Act, that being the first theory upon which the plaintiff seeks to recover. Then second, if you find that the plaintiff is not entitled to recover for a monopolization,

We, the jury, find that the plaintiff, Southern Blowpipe

* * *

[Caption Omitted]

JUDGMENT

(Filed March 6, 1967)

This action came on for trial before the Court and a jury, the Honorable Frank W. Wilson, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Chattanooga Gas Company, recover of the plaintiff, Southern Blowpipe and Roofing Company, its costs of action.

Dated at Chattanooga, Tennessee, this ____ day of _____, 1967.

KARL D. SAULPAW, JR.
Clerk of Court

By: J. Robert Dale
Deputy in Charge

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR AN IMMEDIATE INJUNCTION

(Filed March 9, 1967)

The plaintiffs move for a judgment in their favor on the issue of liability notwithstanding the verdict of the jury, and move the Court to immediately enjoin the defendant from operating in its capacity as a franchised monopoly in the relevant markets occupied by the plaintiffs, namely (1) the bidding and contracting for the sale and installation of heating and air conditioning systems and related equipment in home, commercial and light industrial installations, and (2) the sale and installation of coin operated laundry equipment; both in the geographic area in which the defendant, Chattanooga Gas Company, operates a natural gas distribution system.

JOHN I. FOSTER, JR.
and
SIZER CHAMBLISS

By .....
John I. Foster, Jr.

[Certificate of Service Omitted]

[Caption Omitted]

ORDER

(Filed March 20, 1967)

This case is before the Court upon the motion of the plaintiffs for a judgment notwithstanding the verdict and for an immediate injunction. Having considered the motion and the briefs of the parties and the record in this cause, the Court is of the opinion that the motion should be denied.

It is accordingly ORDERED that the motion for judgment notwithstanding the verdict and for an immediate injunction, said motion filed upon behalf of the plaintiffs, be and hereby is overruled.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

[Caption Omitted]

ORDER

(Filed April 17, 1968)

Before: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges

There being substantial evidence to uphold the special jury verdicts and the judgment of the United States District Court for the Eastern District of Tennessee, Southern Division, the judgment is hereby affirmed.

Entered by order of the court

/s/ Carl W. Reuss
Clerk

Issued as Mandate: May 20, 1968

COSTS: NONE

[Caption Omitted]

ORDER

(Filed May 10, 1968)

Before: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges

On consideration of the petition for rehearing in the above-styled case, the same is hereby denied.

Entered by order of the court

/s/ Carl W. Reuss
Clerk

EXCERPTS FROM TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

* * *

Q Now, I believe—did you know about—did you help develop this business that Smith Air Conditioning has done in the last two years. Did you work with them on this installation and development of their business?

A Oh yes, not only Smith, but the rest of them too.

Q Have you, or has the Chattanooga Gas Company, rather, taken any steps that you know of to discourage in any way other contractors from getting into the heating

and air conditioning and appliance field?

A No, sir, I would like to see them doubled, I would sleep better at night.

Q This may be repetitive but have we run a training school for installers in this field for other com-
[504] panies?

A Yes, sir, we have done that for several years.

Q And what is the purpose of that?

A Well to keep them informed on our codes or methods of installations and safety precautions that codes change and they don't know about. Piping changes, and styles, we inform them of that. Clearance on bidding.

Q Well, I believe I asked you this, but prior to the time that you went into this field and developed it in 1959, '60 and '61, I believe—did I ask you whether there were any central air conditioning, heating units of gas being installed in the home market in Chattanooga?

A In '59 until '61 and '62 they were very spotted. We didn't have too many gas jobs going in but there still was a lot of electric going in.

Q Now in '66, can you tell us whether or not the outside or air conditioning, heating and dealers besides the Gas Company, installed more or less units in '66 in the new home market than the Gas Company?

A I have forgotten the figures, but I believe the dealers installed one hundred and sixty central systems and we did about one hundred and forty. I may be
[505] wrong there but the dealers did more than we did.

Q And was this business that you had developed and pushed out to them?

A I'll say ninety-five percent was what we had given them.

Q Has the Gas Company ever made any attempt to go

into the ductwork business?

A No, sir.

MR. SPEARS: That's all.

CROSS-EXAMINATION

BY MR. FOSTER:

Q Mr. Prince, what is your position? New building and working with contractors?

A Yes, sir.

Q Do you have anything to do with residential, commercial—I mean residential conversion market or—

A No, I'm in construction—

Q In 1953 did you have anything to do with the sale of gas heating units to homes?

A Not in old houses, no, sir.

Q You didn't do anything in new houses in those days? Did you say?

A We worked it, yes, sir. We tried to get the business.

[506] Q For heating units in new houses?

A Yes, not necessarily we doing the selling, we were trying to get the gas business.

Q Were you with the Gas Company before they got natural gas?

* * *

commercial and light industrial installations—has a direct impact on goods moving in interstate commerce which means across the state line. Or on goods which are in the flow of commerce, which means that the interstate journey of the goods is deemed not to have halted, whether the goods be in the destination state or on their way to the final consumer, or in the originating state awaiting shipment. If you find that the conduct here alleged operated

directly upon goods in interstate commerce or in the flow of interstate commerce, the question of how much commerce is involved is immaterial, for the law requires that only a negligible amount of commerce be involved for the requirement of interstate commerce to be satisfied. If you find that the equipment was moving in interstate commerce or in the flow of commerce and that the activities of the defendant had a direct impact upon such interstate commerce, then this requirement of the Sherman Act would be satisfied.

[557] Now, you notice that I have previously in these instructions referred to the relevant market. Let me turn your attention to that matter somewhat further at this point. The defendant, Chattanooga Gas Company, has of course a lawful monopoly in the sale and distribution of natural gas in the Chattanooga area. It has that monopoly under the public utility laws of the State of Tennessee. It is not contended that the defendant's monopoly in that market, that is the sale and distribution of natural gas, is wrongful or that such a monopoly entitles the plaintiff to any relief. In certain areas the state and Federal Government have found it necessary and proper to grant such legal monopolies such as, for example, telephone companies where it would not be feasible to have ten different telephone companies in a community trying to operate lines, gas company, electrical distribution company and other

* * *

what did or did not happen prior to January 7, 1960, as it may have been shown by the evidence in determining whether defendant was, or as it may have any bearing on the issue of whether the defendant was guilty of any

[559] anti-trust violation after that date, or whether the defendant was innocent of any such violation after that date, all to the extent that such evidence may be rele-

vant or may be material to that question.

Let me turn your attention now to the plaintiff's contention that the defendant has monopolized the relevant market. The word "monopolize" or "monopolizing" as is used in the statute that I have read to you and which is made illegal under the terms of the Sherman Anti-Trust Act, consists of the possession of a monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or a business acumen or historic accident. It is the existence of a monopoly power coupled with the intent to use it for anti-competitive or monopolistic purposes or with the inevitable anti-competitive effect that establishes monopoly or a monopolization as that word is used in the statute. In other words, monopolizing means to acquire or to maintain the power to exclude actual or potential competition from the field accompanied with the intent or the purpose to exercise that power. In other words, both elements must be found to exist. A monopoly violation presupposes exclusive possession or control by a person or organization or the means and practices by which if attempted the person or organization could gain exclusive possession or control of a market to the exclusion of all other
[560] actual or potential competitors. This is what we are referring to when we talk about monopoly power. Monopoly power is the power to control prices or to exclude

* * *

THE COURT: Gentlemen, have you been able to arrive at a verdict yet upon all issues?

FOREMAN: No, sir.

THE COURT: All right. Is there any matter in which the Court can be of assistance to you?

FOREMAN: Yes, sir, I have one clarification—

THE COURT: Be careful please in stating any proposition to the Court not to reveal the deliberations of the jury. That would not be proper, but if there is any question of law or any explanations or instructions, I'll be more than happy to—

FOREMAN: Sir, we would like to be clarified more on this portion of the second count, to have a better definition for us, of this portion of it for an attempt to monopolize in violation of the Sherman Anti-Trust Act.

THE COURT: All right.

One theory upon which the plaintiff seeks to recover is that the defendant has attempted to monopolize the relevant market, that is the heating and cooling market in the residential, light industrial and commercial field. This theory of the plaintiff, of course, is based upon Section 2 of the Sherman Act which makes it a violation of the law to attempt to monopolize. The term attempt to monopolize as [578] used in the Federal Anti-Trust laws involves two essential elements. One is that the defendant must have been shown to have had the specific intent to monopolize; that is, that the defendant gas company must have intended to monopolize this heating and cooling market, and second, that the defendant, Chattanooga Gas Company, must have done some act in fulfilling that intent or in carrying out that purpose but insufficient to actually have produced the intended monopoly. In other words, the law distinguishes in this particular instance between having actually acquired a monopoly and intending to acquire a monopoly, and as I understand your inquiry as directed to the Court. Now just to the phase of the case that involved the allegation that the defendant, Chattanooga Gas Company, intended or attempted rather to monopolize. In order to find an attempt to monopolize, you must find both

elements, namely an intent on the part of the defendant to monopolize and some act or acts upon their part in fulfilling that intent, and it must appear that together they result in a reasonable probability that monopolization will sooner or later occur. While only a general intent is necessary to show monopolization, where the charge is an attempt to monopolize, the intent must be shown to be the specific intent to gain control over the relevant market and to exclude competitors from that market. The specific intent required to show an attempt to monopo-
[579] lize is a specific subjective intent to gain a monopoly and to destroy competition, so that one relevant inquiry insofar as the second issue is concerned, will be for the jury to determine whether under all of the evidence —a preponderance of the evidence—shows that the defendant did attempt to monopolize the field and did so, and that a preponderance of the evidence shows that they intended to monopolize the field and did some act in furtherance of that attempt.

Now, does that or not answer the question that you may have had?

FOREMAN: Yes, sir. Could they be guilty without—

THE COURT: Don't reveal what your own thinking may be—that wouldn't be proper.

FOREMAN: *Could they be guilty without intent*?

THE COURT: The defendant, Chattanooga Gas Company, could not be guilty of attempting to monopolize the heating and cooling market in home, commercial and light industrial, which is the relevant market, they could not be guilty of attempting to do that unless they had, from a preponderance of the evidence it was shown that they intended to do just that. So it will be up to the jury to look to all of the evidence and attempt to determine on that issue what was the intention of the defendant. All right.

Now, gentlemen, when I give you these specific
[580] instructions on some phase of the case, don't fail to bear in mind all of the instructions on all phases of the case that I have given to you because you should bear all of those instructions in mind in making your decision. (JURY OUT FOR DELIBERATION.)

THE COURT: All right, gentlemen, is there anything further in connection with the additional instructions of the Court?

MR. CHAMBLISS: Your Honor, I may be wrong, but I got the impression from the last question relating to whether or not it is possible, if the monopoly was in existence, whether it was required that specific intent also be—

THE COURT: Well, will you play back and see what the question was please?

(REPORTER PLAYS BACK PORTION REQUESTED BY COURT.)

THE COURT: Does that answer your question raised?

MR. CHAMBLISS: I'm not sure, your Honor. *I had the impression at the time that he wanted to know if they could be guilty of a monopoly without intent*, and it sounded like can they be guilty without intent, and I don't know whether he meant a monopoly in being or cause he meant a monopoly by attempt, and your explanation made it very clear that the explanation only applied to the attempt.

THE COURT: Yes, and then I also—that's the reason I added to my instruction the matter that they should
[581] bear in mind all of my previous instructions and not limit themselves just to these supplementary

* * *

MATERIAL ON NATIONAL IMPORTANCE OF THE QUESTION

* * *

RESOLUTION OF

SHEETMETAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.

Adopted November 30, 1967 in
San Diego, California

"Be it resolved that SMACNA officially take a position in favor of such action including legislative, administrative and judiciary proceedings which would eliminate unfair competitive practices by regulated utility companies."

EXCERPT FROM PROCEEDINGS OF THE 85th ANNUAL CONVENTION

of the

NATIONAL ASSOCIATION OF PLUMBING-HEATING-COOLING CONTRACTORS

1967

"RESOLUTION NO. 1

"SPONSORS: Ohio; Kansas; Arizona; Northwestern Ohio; Missouri; Billings, Montana; Mississippi; Indiana; North Carolina; Oklahoma; Alabama; Kentucky; West Virginia; Massachusetts; Texas; Georgia; Tennessee; Minnesota; Metropolitan Detroit and Michigan; Arkansas and Florida.

"WHEREAS: The public utility companies have been and are now competing with the plumbing-heating-cooling contractors in the sale at retail and installation of plumbing-heating-cooling appliances and equipment; and

"WHEREAS: Such competition is of grave concern to and has caused or will cause irreparable injury to the plumbing-heating-cooling contractors; and

"WHEREAS: In many cases such competition has been pursued and carried on by the public utility companies in a manner and to an extent

believed to violate the proscriptions of applicable law, including the Federal Trade Commission Act, all as more particularly set forth in the application for a complaint against the public utility companies filed by this Association with the Federal Trade Commission; and

"WHEREAS: The members of this Association urgently support the filing of such application for a complaint and concur in the imperative need for the relief prayed for therein; now therefore be it

"RESOLVED: That the National Association of Plumbing-Heating-Cooling Contractors continue and persevere in its efforts through all available legal and proper means to insure that plumbing-heating-cooling contractors may be able on fair terms and in accordance with law to compete with the public utility companies in the sale at retail and installation of plumbing-heating-cooling appliances and equipment.

Mr. Chairman, your Committee concurs in this resolution."

AGENDA

HOUSE SMALL BUSINESS COMMITTEE

SUBCOMMITTEE ON REGULATORY AND ENFORCEMENT AGENCIES

HEARINGS ON PROMOTIONAL PRACTICES BY PUBLIC UTILITIES AND THEIR IMPACT UPON SMALL BUSINESS

SCHEDULE OF WITNESSES

Tuesday, March 19, 1968
10:00 a.m.

1. Senator Lee Metcalf (D-Montana)
2. Mr. James E. Ray
   Spokesman for The Sheet Metal and Air Conditioning Contractors National Association (SMACNA)
3. Joseph Paquette
   East Hartford, Connecticut
4. John Ricca
   Oakton, Virginia
5. Jack Luskin,
   Appliance Retailer
   Baltimore, Maryland

EXCERPTS FROM STATEMENT OF JAMES E. RAY before Subcommittee No. 5

ACTIVITIES OF REGULATORY AGENCIES RELATING TO SMALL BUSINESS

John D. Dingell, Chairman

Mr. Chairman, members of the Subcommittee, Counsel; my name is James E. Ray and I am Manager of the Central Georgia Sheet Metal Contractors Association, Inc.— Chapter of the Sheet Metal and Air Conditioning Contractors National Association, Inc. Accompanying me is James H. Ferguson, Director of Industry Relations of the Sheet Metal and Air Conditioning Contractors National Association.

* * *

SMACNA, now celebrating its 25th anniversary, is the official spokesman for the sheet metal and air conditioning industry, which is composed of approximately 8,000 small businessmen. While these firms are an integral and important partner in the huge construction industry, individually they employ on the average less than 10 journeymen and/or apprentices each.

* * *

Up to this point I have been talking about experiences I have personal knowledge of in East Tennessee. However,

I assure you these practices are prevalent in most areas of the country as evidenced in meetings of our national chapters and by correspondence we have received. I would like to quote a portion of a letter from a St. Louis, Missouri contractor.

"We have more than enough competition from our large chain stores with their tremendous purchasing power, without competition from Laclede Gas Company here in St. Louis. Both the chain store and the gas utility have other means of making a profit. The chain department store has many other items to sell after the customer is lured into his store by baited air conditioning ads. The gas utility has his natural gas fuel to sell.

"While both are unfair competition the latter is by far the worst because he sells each piece of heating and air conditioning equipment below his cost to increase the gas load for the gas utility company. He cannot lose money because he can always apply to the Public Service Commission and receive a rate increase when his profits drop below normal.

"With every Laclede Gas Co. sale of gas air conditioning equipment and its accompanying losses, I, as a user of gas fuel in my home and place of business, find, that I am subsidizing the losses of my competitor. I am paying more for my natural gas fuel to cover their losses. The loss is estimated at approximately $700 per sale by Laclede Gas. Every gas user on the gas pipe lines are paying more for gas fuel to cover these losses.

"As an Air Conditioning Contractor I am also losing a potential sale and a fair profit from that sale, when Laclede Gas Co. sells air conditioning.

"Please do your best to bring about relief from this unfair situation here and in other areas of the country."

Another St. Louis Contractor states:

"In St. Louis and St. Louis County it is virtually impossible for a Sheet Metal & Air Conditioning Contractor to bid a complete gas air conditioning job. The Laclede Gas Company advertises, promotes and quotes all the gas air conditioning in this area at prices we contractors cannot meet. They also make it easy for the customer by financing and letting the customer pay this along with his regular monthly gas bill."

A letter from a contractor in Ogden, Utah says:

"Our local gas and electric companies are promoting their respective fuels and each are offering cash kickbacks to the owner if they will use their product exclusively. No small business distributors could afford to do this. In addition, they are employing a large number of people to do the sales contract work that private industry should be doing. This is all being financed the utility revenues from the private consumer.

"In many cases the bidding of a project is delayed several weeks, while the confused owner tries to ferret out the propaganda and enticements given him by the utility company representatives, each vying for his business.

"Each fuel has its place and each given job should be studied for its own merit. This is not being done, nor can be done, until the utility companies are either rested from this type of activity, or required to show profit on that phase of their business as a private enterprise would have to do."

From the Phoenix, Arizona Chapter of SMACNA:

"The Air Conditioning Contractors of Arizona have great concern on the question of Utility competition with our Contractors.

"The Salt River Project Government Co-op which competes with Arizona Public Service states that they too, would sell, install and service equipment if their competitors did so.

"The Southern Union Gas Company which operates in Flagstaff, Arizona, has a show room for Air Conditioning equipment. Their Company also sells, installs and services air conditioning equipment. The Company, whose principle office is in Las Vegas continues to promote these services even though we have protested their action.

"There is another Company whose headquarters are in Texas that was doing something as Southern Nevada until a protest was made by Pipe Trades to the Corporation Commission.

"The Air Conditioning Contractors of Arizona feel a very grave concern about the type of competition which is subsidized by the Utility through its' rate structure. The Flagstaff firm will sell the equipment direct as indicated and will bill the customer monthly with his electrical bill.

"All of the Contractors in the State of Arizona are greatly disturbed by this unfair competition. We strongly urge SMACNA opposing any bill in which the competitor has a monopoly and is protected by reason of it being a Utility."

The Minneapolis—St. Paul Chapter writes:

"In Minneapolis the Minnegasco people promote, sell and install gas lights, appliances, etc. Air conditioners are sold by them, but a flat cost for installation is given to only about two different contractors (one a member of ours); he only makes the connections and the Gas Company pays him for the labor and a small commission (we guess). The service from there on and forever is handled by the Gas Company. This operation has bugged many of our contractors and they all agree that something should be done to get the Gas Utility out of the merchandising field. It is using its guaranteed profit system to control the market, and make no mistake about it.

"The Electric Utility has given the local electrical contractors a bad time also. We do not believe a monopoly should be allowed to compete with legitimate business people in any manner. They are power suppliers only, protected by the government with a guaranteed profit and that should be the extent of their activities.

"The public utilities will claim private business does not promote local building fast enough to suit them, but private merchandisers do not have a bottomless barrel of money to hire B.T.U. and K.W. chasers. If the government will guarantee our profit, I am sure we can and will do a better job than they now do."

From Crystal Lake, Illinois:

"I'm writing to you as president of the Fox Valley Sheet Metal Employers Association, to ask how you're getting along with your lawsuit against the gas company. We are as an organization concerned that the gas company is encroaching too far in our business by selling air conditioning and heating equipment direct."

An Akron, Ohio contractor comments:

"Noted in refrigeration news that Gas Company representatives contend that its purpose in selling equipment below cost was done in face of cheap TVA power competition.

"In Ohio there is no TVA competition but the gas utilities sell equipment at cost or below. It seems to be a vicious national policy."

* * *

NATIONAL OIL FUEL INSTITUTE, INC.
60 East 42nd Street
New York, N. Y. 10017

April 30, 1968

Mr. John I. Foster
Maclellan Building
Broad Street
Chattanooga, Tennessee

Dear John:

We at NOFI were quite disappointed to learn of the decision rendered by the Circuit Court of Appeals rejected your appeal in the Southern Blowpipe Case.

We wish the court had rendered a written opinion dealing with the tremendously important ruling of law which if

not resolved in favor of the small businessman could lead to his extinction.

The court in not having rendered an opinion leaves open for further consideration the problem of whether or not utilities, in engaging in business other than the franchise monopoly originally granted to them by local governments, can, as an extension, engage in other businesses and treat business losses thereunder in their rate base.

NOFI for years has been supporting its chapters throughout the country which have endeavored to curtail these practices through efforts in their particular states. These efforts have rarely been successful.

Actions have been pursued before regulatory bodies and courts in increasing frequency during the past several years. In most instances where the action has been predicated on the damaging effect of utility practices upon small business, the resulting decisions have denied jurisdiction. This is the basic reason for the Congressional hearings now investigating unfair trade practices of utilities.

Under separate cover we are forwarding pertinent statements of Senators Metcalf and E. M. Kennedy made before this committee during the last month.

In behalf of our 8,000 retailers we urge you to continue to seek judicial consideration of the vital issues at stake. This matter, if left unsettled can easily result in the limitation and throttling of competition in those areas outside the utility franchise granted to such monopolies.

Sincerely,

/s/ George Gruberg
George Gruberg
General Counsel

GG:ra

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 304.

SOUTHERN BLOWPIPE & ROOFING COMPANY
and E. J. HOPTON,

Petitioners,

vs.

CHATTANOOGA GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 304.

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CHATTANOOGA GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The respondent, Chattanooga Gas Company, for its statement in opposition to the petition for certiorari, respectfully shows the following:

OPINION BELOW.

The original plaintiff, Southern Blowpipe and Roofing Company, filed its complaint in the District Court seeking relief under the provisions of Sections 1 and 2 of the Sherman Act. The District Judge construed the allegations in the complaint as averments of an attempt to monopolize on the part of the defendant, Chattanooga Gas Company, and, on the basis of information contained in depositions and affidavits on file, sustained a motion for summary judgment and dismissed the complaint.

On appeal, the Court of Appeals held that the allegations in the complaint could be construed as allegations

of a present monopoly or monopoly power. That Court, therefore, remanded the case to the District Court in order that the relevant market might be defined, the case tried on its merits, and a determination made in the District Court of whether there was a monopoly or a monopoly power. 360 F.2d 79.

After the case was remanded, the original plaintiff filed an amended complaint, and another plaintiff, E. J. Hopton, filed a complaint. The case was tried before a jury, and the jury found that there was neither a monopoly nor an attempt to monopolize. The two plaintiffs then appealed to the Court of Appeals.

On the second appeal, the Court of Appeals, recognizing that a determination of the case depended upon issues of fact and that those issues had been resolved by the verdict of the jury, did not file an opinion but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

JURISDICTION.

1. The respondent, Chattanooga Gas Company, urges that this Court is without jurisdiction for the reason that the determination of the case below depended upon issues of fact which have been resolved by a jury verdict and approved by both the District Court and the Court of Appeals.

2. The respondent asserts that the sole question presented by the petition presupposes or assumes a factual situation which the trial of the case showed to be nonexistent, and that this Court is without jurisdiction to consider a hypothetical question when a ruling would not affect the rights of the litigants.

QUESTIONS PRESENTED.

1. Where the complaints filed in the District Court allege that a company, with a legal franchise to distribute natural gas in the market area, has acquired a monopoly and a monopoly power in the sale and installation of heating and cooling equipment and coin-operated laundry machines, in violation of Section 2 of the Sherman Act, and these issues are presented to a jury under a full and fair charge, and the jury returns a verdict specifically finding that the company has neither a monopoly nor has attempted to monopolize in such selling and installing, and both the District Judge and the Court of Appeals find that the jury's verdict is supported by adequate evidence, is a substantial question under the antitrust laws presented for consideration by this Court?

2. Where a legal question raised by the plaintiffs in the District Court and the Court of Appeals presupposed or assumed a factual situation which a trial of the case showed not to exist, and for that reason neither the District Court nor the Court of Appeals ruled on the question, will this Court consider such a hypothetical question when a ruling would not now affect the rights of the litigants?

3. Where a company is engaged in the business of distributing natural gas, in an area in which electric power, generated and distributed by governmental agencies, is so plentiful and cheap and its use is so widespread that the area is known as "the electric center of the world," and where competition for a gas distributing company is considered more difficult than any other locality in the nation, is it a violation of Section 2 of the Sherman Act for such company to sell and install heating and cooling equipment and coin-operated laundry machines, at a profit, for the purpose of promoting the sale of natural

gas, and a jury has found that the company has neither acquired nor attempted to acquire a monopoly or a monopoly power in the sale and installation of such equipment?

STATEMENT OF THE CASE.

1. The Pleadings, the Trial, and the Judgments of the District Court and the Court of Appeals.

On January 7, 1964, Southern Blowpipe & Roofing Company, which will be referred to as Southern, filed its complaint against the Chattanooga Gas Company, alleging that the Gas Company was selling and installing *gas* appliances and equipment below cost, in competition with Southern and others, and that such activity tended to create a monopoly and that it rendered competition in selling impossible. (Appendix A, 29.) In its answer, the Gas Company denied the allegations and averred that it was selling gas appliances and equipment at competitive prices for the purpose of promoting the sale of natural gas. (Appendix B, 30.)

On the Gas Company's motion for summary judgment, the District Judge held that the complaint alleged, not a present monopoly, but an attempt to monopolize. The depositions and affidavits on file clearly showed that it was manifestly to the advantage of the Gas Company to have as many dealers as possible selling gas appliances and equipment and that there was no possible reason why the Gas Company would want to curb such sales by other dealers. The District Judge held that an attempt to monopolize required specific intent and that there was no evidence of such intent. He, therefore, sustained the motion and dismissed the suit. (Appendix C, 34.)

Southern then made its first appeal to the Court of Appeals. That Court was concerned, not by any novel

question raised by Southern on the appeal, but by the vague and ambiguous wording of the complaint. The Court held that the complaint could be construed as alleging a present monopoly or monopoly power rather than an attempt to monopolize, as found by the District Judge. The Court of Appeals, therefore, remanded the case in order that the relevant market might be defined, the case tried on its merits, and a determination made in the District Court of whether there was a monopoly or a monopoly power. 360 F.2d 79.

After the case was remanded, Southern elected not to proceed on its complaint. Instead, it filed an amended complaint in which it substantially changed the nature of its cause of action. It averred that the Gas Company had a legal monopoly in the sale and distribution of natural gas in the area and that by virtue of such fact it had acquired a monopoly and monopoly power, not in the sale and installation of *gas appliances and equipment,* as alleged in the first complaint, but in the sale and installation of *heating and air conditioning systems* generally. (Appendix D, 38.)

E. J. Hopton, who will be referred to as Hopton, filed a complaint similar to Southern's amended complaint, but referring to coin-operated laundry machines instead of heating and air conditioning systems. (Appendix E, 40.)

At the pretrial hearing, the District Judge defined the relevant market. It was determined that the geographic area involved was the City of Chattanooga and the adjacent territory in which the Gas Company distributes natural gas. The products and activities involved were the selling and installing of heating and air conditioning systems (1) in the residential market, (2) in the commercial market and (3) in the light industrial market, and (4) the selling and installing of coin-operated

laundry machines. The pretrial order did *not* limit the market to gas-operated equipment. (Appendix F, 42.)

The pretrial order provided that there were two principal issues of fact to be determined by the jury: (1) whether the Gas Company had violated the antitrust laws by monopolizing the sale and installation of the mentioned products in the several markets and, if not, (2) whether the Gas Company had attempted to monopolize such markets.

After a full hearing of the evidence at the trial, the District Judge charged the jury on Southern's contentions that the Gas Company was selling and installing below cost and that the company's ability to indulge in such practice was possible because it had a legal monopoly to distribute natural gas in the area and could absorb its losses in its general operating expenses. (Appendix G, 43.)

The District Judge's instructions were full and complete. He defined the offense of monopolizing, and explained that only general intent was required. He defined the offense of attempting to monopolize and explained that specific intent was required. After the jury had been deliberating nearly two hours, its members returned to the courtroom, and the foreman requested additional instructions on the offense of attempting to monopolize. The District Judge again explained that only a general intent was required in monopolizing and that a specific intent was required in an attempt to monopolize, and emphasized that the jury should bear in mind all of the instructions previously given on all phases of the case. (Appendix G, 49.)

In its verdict the jury found that the Gas Company was not guilty of monopolizing and also that it was not guilty of attempting to monopolize. (Appendix G, 51.)

Southern, together with Hopton, then appealed to the

Court of Appeals for the second time. Neither plaintiff raised any question as to the sufficiency of the evidence to support the verdict of the jury. Because the decision of the principal legal questions depended upon the factual issues, and those issues had been resolved adversely to the plaintiffs' contentions by the verdict of the jury, the Court of Appeals did not write an opinion, but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

In their petition to rehear, Southern and Hopton said: "The appeal in this case did not question the propriety of the jury verdict—did not contend that there were inadequate facts to support that verdict." The Court of Appeals denied the petition to rehear.

2. The Facts.

Neither Southern nor Hopton introduced a scintilla of evidence to prove the total volume of commerce in the relevant market, the percentage of that volume held by them, or the percentage of that volume affected by the Gas Company's activities.

As to the *residential market,* the evidence introduced by the Gas Company showed that in 1966 the sales by other dealers of electrical appliances and equipment amounted to $20,185,677. (Appendix H, 53.) During the same period, the Gas Company's sales of all types of gas burning equipment and appliances for all purposes amounted to only $702,000. (Appendix I, 55.) The Gas Company's sales of all equipment were thus 3.5% of the sales of electrical equipment for residential use only.

In the *commercial market,* for the period extending from July, 1963 to the date of trial, the Gas Company had sold and installed only 7.7% of the gas equipment, as

measured on a volume-intake basis. (Appendix J, 57.) As to the light *industrial* market, the evidence showed that this work is done according to plans and specifications, and that the Gas Company only rarely seeks such jobs. Southern admitted that the Gas Company is not even in competition with it in that market. (Appendix K, 57.)

As to the *coin-operated laundry machine market,* the evidence showed that the one sale Hopton claimed to have lost to the Gas Company occurred in 1959, more than four years prior to the filing of the suit, and that that single sale was lost because Hopton's company would not approve the proposed credit arrangement. (Appendix L, 59.)

The *geographic market* involved in this suit is the City of Chattanooga and adjacent areas. It is in the heart of the area served by the Tennessee Valley Authority. Electricity is so cheap, its supply so plentiful, and its use so widespread that the city is known as the "Electric Center of the World." (Appendix M, 62.) In 1966 the Chattanooga Electric Power Board had more than 82,000 residential customers, and of these 60% were heating their homes electrically. Ninety-eight per cent of the residential customers had electric refrigerators, 89% had electric water heaters, and 97% had electric ranges. (Appendix H, 53.) This cheap electric power was made available in the area in the 1930's.

Up until 1950 the Gas Company was a small company which distributed manufactured gas produced by coke ovens. Only some 3,000 to 4,000 homes in the area were heated by gas. (Appendix N, 68.) The company could not possibly compete with the sale of cheap electric power. In 1950, for the first time, natural gas became available in the market area. In an effort to gain acceptance of this new fuel, the Gas Company tried to persuade as many dealers as possible to sell gas appliances and equipment.

(Appendix N, 68.) The dealers made many sales and did well until 1953, at which time the market had become saturated and post-war demands had been met. Gas heating sales decreased for Southern and for all other dealers. (Appendix O, 76.)

The real demand was for electrical appliances and equipment, and the dealers lost interest in the sale of gas equipment. From 1954 to 1960, the Gas Company made no progress in its efforts to expand the use of natural gas, and by 1960, the beginning of the period covered by this suit, the company was actually losing customers. Since other dealers and contractors showed little interest in the market, the Gas Company was compelled to step up its efforts and try to gain the permission of builders of new homes to lay gas lines in subdivisions, and to install gas heating and cooling equipment. (Appendix O, 76.) The company's efforts met with some success, and as its sales and installations increased in volume, other dealers and contractors again became interested in the gas market. The Gas Company was pleased, and referred as many jobs as possible to other dealers and contractors. (Appendix P, 79.)

The Gas Company purchases its supply of gas on a demand-commodity basis. The demand charge is paid for the privilege of being able to take from the pipeline a certain number of cubic feet of gas during a certain period. This is a fixed charge, and is payable regardless of whether the company uses the amount of the demand. The second element is the commodity charge, at a much lower rate, which is based on the amount of gas the company actually uses. (Appendix M, 64.)

The amount of the load on the company's lines is a vital factor in determining the rate that can be charged the ultimate consumer. This is true because of the fixed

charges under the demand rate. If the company could sell the maximum number of cubic feet of gas which it has the privileges of taking from the pipeline, the gas would cost less per unit, and the rate to the ultimate consumer would be lower.

The only way natural gas can be used is by gas-burning equipment. It is to the company's advantage to have as many dealers and contractors selling as much gas-burning equipment as possible. It has assisted other dealers by helping them make sales, conducting contests and giving them prizes and bonuses, furnishing them free engineering services, conducting schools to teach them and their employees how to sell and install equipment, and by selling equipment to them at cost plus a small handling charge. (Appendix O, 71.)

Any customer, or prospective customer, on the gas lines, also has available electricity, oil, and coal. He is not required to use gas. He also has the privilege of using any combination of the several fuels for heating and cooling. As a public utility, the Gas Company must furnish gas to all persons desiring it, regardless of where or from whom they purchase their equipment. (Appendix N, 71.)

The Gas Company, in promoting the sale of natural gas, follows the prevailing practices in the market area. Oil companies sell and install oil-heating equipment to promote the sale of oil. (Appendix Q, 80.) The Chattanooga Electric Power Board, although it does not sell and install electrical equipment, promotes such sales for dealers and contractors by furnishing free engineering services, obtaining bids for prospective uses of electricity, and by making cash allowances to new customers in apartment projects. (Appendix R, 81.)

The reasonableness of the promotional expense of a company is measured by the ratio of the expense to the total sales of the company. The average range in the United States is from 3% to 3.85%. The Gas Company's promotional expense has varied from 2.5% to an occasional 3.5%, and is considered reasonable by experts in the field. (Appendix M, 61.)

The Gas Company figures all jobs at a profit, and never intentionally figures any job at a loss. In making its estimates, the company includes the cost of the equipment, the freight, the expense of the transportation of the equipment to the point of installation, materials and labor, and the cost of any work sub-contracted. To the sum of these items is added a percentage to cover overhead and profit. (Appendix O, 75.)

The Gas Company is regulated by the Tennessee Public Service Commission, and is required to keep its books in accordance with the uniform system of accounts, devised by the National Association of Railroad and Utilities Commissioners. This system of accounts is designed to reflect the operations of the company as a gas distributing company. The accounting system treats appliances and equipment sales as part of the company's activities in promoting the sale of natural gas. (Appendix M, 59.)

Some of the company's expenses are definitely chargeable to the sale of natural gas. Still other expenses are properly chargeable to the sale of appliances and equipment. But the system of accounts provides no guidelines for apportioning expense that is chargeable to both the sale of gas and the sale of equipment. For instance, an advertisement urging the public to "cook with gas" promotes the sale of gas and the sale of appliances. The company's salesmen are paid on the basis of the gas-consuming volume of the equipment instead of on the basis of the

dollar value of the sale. The allocation of such expenses is left to the judgment of the accountants. (Appendix M, 60.)

Southern, in an attempt to support its allegation that the Gas Company sells and installs equipment below cost, introduced excerpts from reports made by the company to the Tennessee Public Service Commission. These excerpts contain figures based on apportionments made by the company under the uniform system of accounts. They are not profit and loss statements on merchandising.

The Gas Company, in reporting its total promotional expense, *as a gas company*, allocated roughly 48% of its total sales expense to the cost of making merchandise sales. From a merchandising standpoint, this was not a proper allocation, and presents a distorted picture of its merchandising operations.

The approved method, from a merchandising standpoint, of allocating those expenses cannot be directly charged to either the distribution of gas or the sale and installation of equipment, is to do so by using the ratio that the volume of merchandise sales bears to the total volume of sales. This ratio, in the Gas Company's business, is approximately 7%. (Appendix M, 63.)

When the total selling expense is properly allocated on the basis of the approved ratio, the company's merchandise sales for the past ten years show a new profit. (Appendix I, 55; Appendix M, 65.)

I. NO SUBSTANTIAL QUESTION UNDER THE ANTITRUST LAWS IS PRESENTED BY THE PETITION.

The petitioners ask this Court to review a jury verdict which has been approved by the District Judge and the Court of Appeals. The thrust of the complaints was that the Gas Company was guilty of monopolizing or attempting to monopolize. After a full trial the jury rejected this contention. This Court has said repeatedly that it will not review the verdict of a jury and the concurrent findings of fact by two lower courts.

A. The Complaints Averred a Violation of Section 2 of the Sherman Act.

Southern's original complaint averred that:

> "The defendant * * * sells and installs * * * appliances and equipment at prices and on terms below * * * cost * * *, rendering competition impossible. In addition, the defendant is the distributor * * * for Arkla-Servel * * * equipment, and supplies it directly to consumers at less than cost, or at no charge or on such terms as are unfair and below cost. All of which * * * tends to create a monopoly." (Appendix A, 29.)

Southern's amended complaint averred as follows:

> "The defendant sells, installs * * * heating and air-conditioning systems in competition with the plaintiff * * *, and sells and installs such systems at prices and on terms below * * * cost * * * rendering competition in the sale, installation and servicing of such systems impossible."
>
> * * * * *
>
> "Competition, therefore, between the plaintiff * * * and the defendant no longer exists, because of the present monopoly power being exercised by the defendant * * *." (Appendix D, 38.)

Hopton's Complaint averred as follows:

> "The Chattanooga Gas Company maintains a monopoly * * * in the sale of natural gas in the Chattanooga area. The monopoly power * * * was the enabling factor in the complete suppression of competition in the market for coin-operated laundries * * * in and around Chattanooga. This extension of the monopoly * * * was and is a violation of the Antitrust Laws of the United States * * *." (Appendix E, 40.)

The meaning of the phrases "rendering competition impossible," "competition no longer exists," "the complete suppression of competition," and "tends to create a monopoly" is that the plaintiff averred that the Gas Company had a present monopoly, a monopoly power, or had attempted to monopolize.

B. Monopoly Power in the Relevant Market Is an Essential Element of a Section 2 Violation.

One of the principal elements of a Section 2 violation is the possession of monopoly power.

In *United States vs. Grinnell Corporation,* 384 U.S. 563, at pages 570-571, the Court defined the offense as follows:

> "The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) The possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

C. The District Judge Correctly Charged the Jury.

The District Judge gave a full and fair charge to the jury.

He submitted two issues to the jury: (1) Whether Southern was entitled to recover from the Gas Company for a monopolization in violation of the Sherman Act, and if not, (2) whether Southern was entitled to recover from the Gas Company for an attempt to monopolize in violation of the Sherman Act.

The charge covered the nature and elements of the offenses, the subject of intent, and the contentions of the parties.

1. The Elements of the Offense.

In charging on the issue of *monopolizing*, the District Judge used almost the exact language used by this Court in defining the offense in *United States vs. Grinnell Corporation*, 384 U.S. 563, at pages 570-571. He also defined the offense of attempting to monopolize. (Appendix G, 44.)

2. The Subject of Intent.

On the subject of intent in *monopolizing*, the District Judge stated to the jury;

> "When we speak of intent or purpose to use monopoly power as an essential element of monopolization, we speak of a general intent and not specific intent. To satisfy the requirement of intent to use monopoly power, it is not necessary that the defendant have had the specific intent to establish a monopoly or to destroy competition. The require (sic) intent or purpose is present if monopoly results as the necessary consequence of what was knowingly and intentionally done. When the monopolization has been accomplished, the intent required is only the general intent or the general purpose to do the act which results in a monopolization." (Appendix G, 45.)

In charging on the issue of an *attempt to monopolize*, the District Judge stated that specific intent was required, and then clearly explained the difference between general intent and specific intent as applied to the two possible situations:

> "While only a general intent is necessary to show monopolization, where the charge is attempt to monopolize, the intent shown must be specific intent to gain control over the relevant market and to exclude competitors from that market. The specific intent required to show an attempt to monopolize is a specific subjective intent to gain a monopoly or to destroy competition." (Appendix G, 46.)

When the jury, after beginning its deliberations, returned to the courtroom and requested additional instructions on the subject of intent, the District Judge again explained the law, expressing the rule in almost the identical language he had used in the main charge. He then cautioned the jury to bear in mind all of the instructions on all phases of the case he had given it. (Appendix G, 49.)

3. The Contentions of the Parties.

The District Judge specifically charged the jury on Southern's contention that the Gas Company was selling and installing below cost, rendering competition impossible, and that Southern contended such practice was possible because the Gas Company had a legal monopoly to distribute natural gas in the area. (Appendix G, 44.)

D. The Jury Found That No Monopoly Power Existed.

The jury found that Southern was not entitled to recover from the Gas Company for either a monopolization or an attempt to monopolize, in violation of the Sherman Act. (Appendix G, 51.)

E. The Verdict of the Jury Was Approved by the District Judge and the Court of Appeals.

The District Judge entered an order, based on the jury's verdict, dismissing Southern's action. He overruled the plaintiffs' motion for a judgment in their favor notwithstanding the verdict. (Appendix S, 81.)

On the appeal to the Court of Appeals, neither plaintiff raised any question as to the sufficiency of the evidence to support the verdict of the jury.

Because the decision of the principal legal questions raised by Southern and Hopton depended upon the factual issues, and those issues had been resolved adversely to the plaintiffs' contentions by the verdict of the jury, the Court of Appeals did not write an opinion but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

In their petition to rehear, Southern and Hopton stated that they did not contend that there were inadequate facts to support the verdict.

The rule is well-settled that the decision of a lower Court must be affirmed if the result is correct, even though the court relied upon a wrong ground or gave a wrong reason. *Sec. & Exch. Com. vs. Chenery,* 318 U.S. 80; *Brown vs. Allen,* 344 U.S. 443.

The Court of Appeals was not required to consider each and every question raised by Southern and Hopton. It fully performed its duty, which was to determine whether the judgment of the District Court was correct.

F. It Is Against the Policy and Practice of This Court to Review the Concurrent Finding of Fact by Two Lower Courts.

The plaintiffs below alleged that the Gas Company was violating Section 2 of the Sherman Act in that it was exercising a monopoly power in selling and installing heating and cooling equipment. The District Judge gave the jury a full and fair charge on the issues. The jury found that there was no monopolizing by the Gas Company. Will this Court now review the jury's verdict, which has been approved by two lower courts?

In *Lavender vs. Kurn,* 327 U.S. 645, at pages 652-653, this Court said:

> "* * * Under these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses and arrive at a conclusion opposite from the one reached by the jury."

Two lower courts have determined that there is adequate evidence to support the jury's verdict. In *Graver Tank & Mfg. Company vs. Linde Air Products Company,* 336 U.S. 271, at page 275, this Court said:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious error and exceptional showing of error."

There is no obvious error in the jury's verdict. In fact, the petitioners here, in their petition to rehear in the Court of Appeals, said, in effect: We do not contend that the evidence before the jury was inadequate to support the verdict.

The policy followed by this Court is sound. In *Berenyi vs. District Director, Imm. & Nat. Serv.*, 385 U.S. 630, at page 636, the Court said:

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

The jury, by its verdict, has found that the essential element of "monopoly power" does not exist. The two lower courts have concurred.

No substantial question under the antitrust law is presented by the petition.

II. THE PETITIONERS SEEK AN ADVISORY OPINION BECAUSE THE QUESTION PRESENTED IS HYPOTHETICAL.

This Court has long held that it will not consider abstract, hypothetical, or contingent questions. *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450, at page 461.

Southern and Hopton alleged that the Gas Company was violating Section 2 of the Sherman Act by monopolizing the selling and installing of heating and cooling equipment in the Chattanooga market. The jury, by its verdict, held that this allegation was untrue. The two lower courts concurred. The petitioners, in their petition to rehear in the Court of Appeals, stated that they did not question the sufficiency of the evidence to support the jury's verdict.

The question posed by the petition is this:

> "Forget that there has been a finding of fact by the Court and jury, and suppose there should sometime be a gas distributing company that acquired a monopoly or monopoly power in the sale and installation of heating and cooling equipment, would this be a violation of Section 2 of the Sherman Act?"

The question must necessarily be phrased in this manner because this is a Section 2 case, and one of the essential elements of the offense is monopoly power in the relevant market. *United States v. Grinnell Corporation,* 384 U.S. 563, at pages 570-571. No such monopoly power was found to exist in this case.

This Court is asked to make a ruling on a legal question based on a factual situation which does not exist in this case. Thus, the petitioners are actually asking for an advisory opinion.

In an effort to present a real, instead of a hypothetical question, the petitioners assert that in 1966 the Gas Company installed gas heating and cooling systems in 140 out of 300 new homes constructed in the relevant market. This in itself is hypothetical because neither Hopton nor Southern compete in this market. Hopton was engaged in selling and installing only coin-operated laundry machines. Southern had never even attempted to break into the new home market. (Appendix R, 80; Appendix T, 82; Appendix U, 82; Appendix V, 82.) Southern's president testified as follows:

> "Q. You've never approached them and tried to work with them on developing new subdivisions going electric or gas?
>
> A. No, sir."

This Court will not consider abstract or hypothetical questions.

In *Amalgamated Ass'n., Etc. vs. Wisconsin Employ. Rel. Bd.*, 340 U.S. 416, at page 418, this Court said:

> "A Federal Court is without power * * * to give advisory opinion which cannot affect the rights of the litigants in the case before it."

Again, in *Local No. 8, Oil, Chem. & Atom. Workers vs. Missouri,* 361 U.S. 363, at page 367, the Court said:

> "* * * the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions * * * upon abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it.' "

The question is hypothetical and abstract, and its determination by this Court cannot affect the rights of the litigants.

III. THE RELIEF SOUGHT BY THE PETITIONERS WOULD REQUIRE THIS COURT TO AMEND SECTION 2 OF THE SHERMAN ACT BY JUDICIAL DECREE.

Under the present law, there is no relief which this Court can grant the petitioners. The type of relief they seek is legislative in nature. The petitioners admit, in effect, that the Gas Company has no monopoly or monopoly power. Nevertheless, they insist that the company is in some manner prohibited by the anti-trust laws from selling and installing heating and cooling equipment, at a profit, for the purpose of promoting the sale of natural gas.

A. The Principal Element of the Offense Under Section 2 of the Sherman Act Does Not Exist in This Case.

Section 2 of the Sherman Act provides as follows:

> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

In *United States vs. Grinnell Corporation,* 384 U.S. 563, at pages 570-571, this Court said that one of the two essential elements of the offense of monopoly under Section 2 of the Sherman Act is:

"* * *(1) the possession of monopoly power in the relevant market * * *."

The jury and the two lower Courts have found that there is no monopoly in this case. This Court will not now consider that issue.

If there is no violation of Section 2, this Court is without authority to grant relief.

B. The Sherman Act Does Not Prohibit Necessary and Reasonable Promotional Activities.

This Court has long recognized the right of a gas distributing company to promote the sale of its product. In *West Ohio Gas Company vs. Public Utilities Commission of Ohio,* 294 U.S. 63, at page 72, the Court, speaking through Mr. Justice Cardozo, said:

"* * * We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others * * *."

Certainly the Gas Company has the right "within the limits of reason" to promote the sale of natural gas in an area where electricity is so cheap and plentiful and its use so widespread that the locality is known as "the electric center of the world," and where it is recognized

that competition for a gas company is greater than any area in the nation. (Appendix M, 62.)

"The antitrust laws do not require a business to cut its own throat." *Brown vs. Western Mass. Theatres, Inc.*, 288 F.2d 302, at page 305.

In selling and installing gas burning equipment, the Gas Company is following the customary practice in the market area. Oil companies in the area sell and install oil-heating equipment to promote the sale of oil. (Appendix Q, 80.) The Chattanooga Electric Power Board promotes the sale of electric power by providing free engineering services to dealers in electrical equipment, awarding prizes to new home builders who install electrical equipment, obtaining bids from contractors for prospective users of electricity, and by making cash allowances to new customers in apartment projects. (Appendix R, 81.)

The reasonableness of the promotional expense of a company is measured by the ratio of the expense to the total sales of the company. The average range for promotional expenses by public utilities in the United States is 3% to 3.85%, depending upon the competitive market. Over the years, the Gas Company's promotional expense has run from 2.5% to 2.7% and occasionally 3% to 3.5%. This percentage is considered reasonable by experts in the field. (Appendix M, 62.)

The company's promotional activities are necessary, lawful, and reasonable.

C. Price Reduction For Valid Business Purposes Is Not a Violation of Section 2 of the Sherman Act.

Southern's allegation that the Gas Company sells and installs equipment below cost is based, not on evidence of any specific sales, but on excerpts from reports made by the Gas Company to the Tennessee Public Service Com-

mission. These reports are not profit and loss statements of the company's merchandising activities.

The Gas Company, like all gas distributing companies in Tennessee, is required to keep its books in accordance with the uniform system of accounts. This system is designed to reflect the company's operations as a gas distributing company. The accounting system contemplates that appliances and equipment will be sold, but treats such sales as part of the company's activities in promoting the sale of gas. (Appendix M, 61.)

The Gas Company, in reporting its promotional expenses to the Tennessee Public Service Commission, erroneously allocated 48% of its total promotional expense to its merchandising activities. This, of course, tended to indicate that the company was selling appliances and equipment at a loss. Under approved accounting procedures, the company should have allocated to merchandising approximately 7% of the total promotional expense, because its merchandise sales account for only 7% of its total sales as a gas distributing company. (Appendix M, 63.)

When the total selling expense is properly allocated on the basis of the approved ratio, the merchandise sales for the period of the last ten years show a net profit. (Appendix I, 55.)

The Gas Company does not sell and install equipment at a loss. (Appendix O, 75.)

The fact that the Gas Company is a public utility does not prohibit it, under the provisions of Section 2 of the Sherman Act, from selling in the market at competitive prices.

Price reduction in a competitive situation is a lawful practice.

In *Schine Chain Theatres vs. United States*, 334 U.S. 110, at pages 120 and 121, this Court said:

> "There is also challenge to the findings that Schine cut admission prices. This seems uncontroverted. But price cutting without more is not a violation of the Sherman Act. It is indeed a practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful per se, facts and circumstances must be adduced to show that its purpose or effect was employed as an instrument of monopoly power. Here there is nothing except a bare finding that at times Schine cut admission prices. That finding is not sufficiently discriminating to withstand analysis and is not adequate to support an injunction against price cutting."

See *Gold Fuel Service, Inc. vs. Esso Standard Oil Company*, 306 F.2d 61, cert. den. 371 U.S. 951.

This Court has specifically held that even sales below cost are not condemned if they are made in furtherance of a legitimate commercial objective, because in such case there could be no "predatory intent." *U. S. vs. National Dairy Products Corp.*, 372 U.S. 29. In that case the Court referred with approval to the holding in *Ben Hur Coal Company vs. Wells*, 242 F.2d 481, 486, where the Court of Appeals said:

> "* * * it is not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market. * * * One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors."

The Gas Company's sole purpose in selling appliances and equipment is to promote the sale of natural gas. (Ap-

pendix N, 68.) No reason had been, or can be, suggested why the company could possibly want to eliminate, or in any manner curb, the activities of other dealers and contractors. Its price reductions have been made for a valid business purpose.

The petition does not present a case in which this Court could grant relief under the present antitrust laws.

D. The Relief Sought by the Petitioners Is Legislative in Nature.

The effect of the petition is to ask this Court to hold that it is a violation of Section 2 of the Sherman Act for a gas distributing company to sell and install heating and cooling equipment, at a profit, for the purpose of promoting the sale of natural gas in a highly competitive fuel market, even though the company has neither a monopoly nor a monopoly power.

Stated differently, the petitioners seek to have this Court hold that a gas distributing company cannot compete with other dealers and contractors in selling and installing appliances and equipment. Only Congress could grant such relief.

The purpose of the Sherman Act is to encourage competition—not to curb it.

This Court will not amend the Sherman Act by judicial decree.

CONCLUSION.

The petitioners, with great zeal, ask this Court to adjudicate what they describe as a new question of national importance and vital to the future administration of the antitrust laws. The factual situation on which the question is based was found by the jury not to exist. The verdict of the jury was approved by the District Judge and

the Court of Appeals. Therefore, the Court is being asked to adjudicate a hypothetical question.

The real insistence of the petitioners is, not that a monopoly power exists, but that a gas distributing company should not be permitted to compete with other dealers and contractors, on any terms, in the sale and installation of heating and cooling equipment. To so hold would be to read into the Sherman Act a prohibition that it does not contain. The result would be to discourage competition, and this would defeat the very purpose of the Act.

The petition should be denied.

W. D. SPEARS,
JACK WILSON,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I, JACK WILSON, one of the attorneys for the respondent, Chattanooga Gas Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ____day of ____ ,1968, I served copies of the within brief for the respondent on Southern Blowpipe & Roofing Company and E. J. Hopton, the petitioners, by mailing said copies in duly addressed envelopes, postage duly prepaid, to their counsel of record, namely: Sizer Chambliss, 400 Pioneer Building, Chattanooga, Tennessee, and John I. Foster, Jr., 202 Maclellan Building, Chattanooga, Tennessee.

JACK WILSON,
350 Maclellan Building,
Chattanooga, Tennessee 37402,
Attorney for Respondent.

APPENDIX A.

Original Complaint filed by Southern Blowpipe & Roofing Company.

COMPLAINT.

(Filed January 7, 1964.)

I.

This action arises under the Anti-Trust Laws of the United States, more particularly the Sherman Anti-Trust Act, 15 USC Sections 1 and 2, and the Clayton Act, Section 15, as hereinafter more fully appears.

II.

The plaintiff, Southern Blowpipe and Roofing Company, is a corporation organized and existing under the laws of the State of Tennessee and having its principal place of business in Tennessee. This action is brought on behalf of the sellers and installers of gas equipment and appliances in the Chattanooga area, who are so numerous as to make it impracticable for all of them to join in this action, and the plaintiff will provide adequate representation of all of them. The questions of law and fact as to all of the class are common.

III.

The defendant, Chattanooga Gas Company, is a corporation, organized in and having its principal place of business in the State of Tennessee. It is engaged in the distribution and sale of gas and gas-operated appliances and equipment in and around Chattanooga, and much of its business is within the State of Georgia. Its business is interstate in nature.

IV.

The defendant sells and installs gas appliances and equipment in competition with the plaintiff and other sellers and installers of gas equipment and appliances in the Chattanooga area. The defendant provides free servic-

ing on its equipment and appliances, and sells and installs such appliances and equipment at prices and on terms below the cost of selling and installing them, rendering competition in the sales, installation and servicing of such appliances and equipment impossible. In addition, the defendant is the distributor in this area for Arkla-Servel gas heating and cooling equipment, and supplies it directly to consumers at less than cost, or at no charge or on such terms as are unfair and below cost.

All of which has caused and is causing great damage to the plaintiff, and to all sellers and installers of gas operated appliances and equipment, and to the public, and tends to create a monopoly.

Wherefore the plaintiff demands judgment for damages, as provided in 15 USC Section 15; and prays for an injunction to issue providing that the defendant discontinue its illegal practices; and for such other and further relief as the Court deems proper, and demands a jury to try this cause.

JOHN I. FOSTER, JR.,
SIZER CHAMBLISS,
Attorneys for the Plaintiff.

APPENDIX B.

Answer of the Chattanooga Gas Company to the First Complaint Filed by Southern Blowpipe & Roofing Company,

ANSWER OF THE DEFENDANT, CHATTANOOGA GAS COMPANY.

(Filed February 14, 1964.)

Comes the defendant, Chattanooga Gas Company, by its attorneys, and for answer to the complaint heretofore filed against it in this cause, says:

I.

The complaint fails to state a cause of action upon which relief can be granted.

II.

The defendant denies that it is violating or has at any time material hereto, violated the Sherman Anti-Trust Act, 15 U. S. C., Sections 1 and 2, or any other anti-trust law of the United States.

III.

The defendant denies that the plaintiff has lawful authority to bring this action for the benefit of anyone other than itself. The defendant further denies that the sellers and installers of gas equipment and appliances in the Chattanooga area are so numerous as to make it impracticable for all of them to join in the action.

IV.

The defendant avers that most of it business is carried on in Chattanooga, Hamilton County, Tennessee, but admits that some of it business is carried on in the State of Georgia. The defendant avers that even if it is engaged in interstate commerce, the matters of which the plaintiff complains do not affect interstate commerce.

V.

The defendant avers that its principal business is the distribution of natural gas. As an incident of its principal business, and in order to maintain its volume of sales of gas at as high a level as possible, it does sell, install, and service gas appliances and equipment. The defendant avers that its business is carried on in an area served by public power agencies, and that electricity sold by such agencies is in competition with the natural gas distributed by the defendant. In an effort to meet such competition in part, the defendant has been forced, as a business necessity, to sell, install and service gas appliances and equipment at prices and on terms that would induce potential users of natural gas to become, and to remain, customers of the defendant company.

The defendant denies that its prices and terms have rendered competition in the sale, installation, and servic-

ing of gas appliances and equipment impossible. On the contrary, the defendant avers that it is manifestly to its advantage to have as many gas appliances in use as is possible, because the greater number of gas appliances in use, the larger is the volume of sales of gas by the defendant. The defendant would show that over a period of years the use of electricity has so predominated in this area that dealers have found it much easier and more profitable to sell electrical appliances than to sell gas appliances and the defendant believes that over a period of time the sale of gas appliances has been so small and of such little consequence to the average dealer, including the complainant, that they have failed to push the sale of gas appliances as they did the sale of electrical appliances. The defendant would show that while it has itself gone into the appliance business for the purpose of promoting the use of gas, that nothing would please it more than for the other appliance dealers to double, triple or quadruple their sale of gas appliances so as to increase the use of gas which is the defendant's main business.

The defendant would further show that any appliances which it sells of any kind or description can be sold equally well by any other dealer and that there is no such thing as an exclusive dealership in gas appliances insofar as the defendant is concerned.

The defendant would further show that what service it renders to the users of gas appliances is for the purpose of encouraging the sale of gas appliances by all dealers and all appliances receive the same service regardless of which dealer sold them. The defendant avers this should help other dealers and be an inducement to the customer to purchase gas appliances.

The defendant would further show that many of the dealers who sell gas appliances are primarily engaged in other business such as plumbing, sheet metal work or roofing, or a combination of these services and, therefore, they do not push or encourage the use of such gas heating and cooling appliances and that it was for that reason the defendant became actively engaged in the appliance business.

The defendant would further show that when it does enter into competition on a particular job, it refuses to engage in any price fixing practices, but engages in active open competitive bidding on the jobs in question as the law requires.

The defendant avers that it does distribute Arkla-Servel gas heating and cooling equipment in this area, and it avers that said equipment may also be distributed by the plaintiff and others, if they so desire. The defendant avers that it distributes said equipment at competitive prices and for the purpose of enhancing its principal business of selling natural gas.

The defendant denies that it has caused any damage whatsoever to the plaintiff and other sellers and installers of gas operated appliances and equipment, or to the public, or that any of its acts tend to create a monopoly.

The defendant denies that the plaintiff is entitled to a judgment for damages or to an injunction.

VI.

Answering further, the defendant affirmatively asserts it reliance on the statute of limitations applicable to this type of action.

All of those matters and things alleged in the complaint not heretofore specifically admitted, denied or otherwise referred to, defendant now denies to the same extent as if specifically denied; and now having fully answered, defendant moves the Court to dismiss the complaint with the costs of the cause taxed against the plaintiff.

W. D. SPEARS, for:
SPEARS, MOORE, REBMAN & WILLIAMS,
Attorneys for Defendant.

APPENDIX C.

Opinion of the District Judge Sustaining the motion for Summary Judgment.

MEMORANDUM ON MOTIONS FOR SUMMARY JUDGMENT.

(Filed October 27, 1964.)

In this class action it is set out that the named and unnamed plaintiffs are engaged in the business of selling appliances for the utilization of natural gas. The defendant, under a state franchise, has a legal monopoly to distribute natural gas in the Chattanooga area. It also sells gas appliances.

The claim of merit for relief made by the named plaintiff is under Sections 1 and 2 of the Sherman Act [15 U. S. C. A. Sections 1 and 2] and the right to maintain the action for threefold damages is based upon Section 15 of the Clayton Act [15 U. S. C. A. Section 15].

The defendant has interposed a motion for summary judgment. The named plaintiff has filed a motion for summary judgment as to liability and asked for a mandatory injunction to issue restraining the defendant from continuing the conduct charged against it.

The record upon which decision must be made, in addition to the pleadings, are: (1) Affidavit of Edward F. Davis, Sales Manager for the defendant and (2) discovery depositions taken by the plaintiff of John Inman Kidd, Secretary-Treasurer of the defendant, S. V. O'Lenic, President of defendant, and Edward F. Davis, the same person who made the affidavit.

The named plaintiff pitches its right for relief upon the proposition that the defendant is selling and servicing gas appliances below cost so as to render fair competition by the plaintiff and those similarly situated impossible and that the defendant's activities in this respect amount to an attempt to create a monopoly.

From reading all the evidence submitted in connection with the motions, there is some difficulty in determining whether there are factual questions in dispute.

It will be assumed that the defendant is selling appliances at cost or cheaper and that such may unfavorably interfere with the sales by plaintiff and those similarly situated. Even so, has the defendant actually violated the parts of the anti-trust law set out as the bases of this action?

Sections 1 and 2 of the Sherman Act provide, in substance, that:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor. * * *"
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

With regard to cases arising under Section 1 of the Sherman Act, as is set out above, suffice it to say that these cases may pose at least four main issues: (1) What proof suffices to establish that "contract, combination in the form of trust or otherwise, or conspiracy" which Section requires? (2) Does the conduct reviewed sufficiently affect "trade or commerce among the several states * * *?" (3) In what market is the effect of the challenged arrangement to be tested and what evidence is relevant in establishing that market? (4) In what relevant market does the challenged conduct "unduly" restrain competition? Of course, there are a variety of devices which constitute unreasonable restraints under Section 1. These devices are generally divided into restraints fixing prices either directly or by controlling production and those devices which "unduly" restrain competitive opportunity or commercial freedom. Examples of the latter would be

permanent combinations through mergers of vertical integration, trying arrangements conditioning the sale or lease of one product on the use of another, collective refusals to deal, forced use of standard contracts, market division among competitors, and dealership systems where there is allocated to each dealer certain exclusive privileges for a prescribed territory. Obviously, the fact situation in this case is such that it does not conform with any of the devices that constitute a violation of Section 1 of the Sherman Act. A bibliography of anti-trust cases dealing with violations of Section 1 of the Sherman Act is set out in the margin.[1]

Section 2 establishes three separate offenses which are as follows: (1) To monopolize; (2) to attempt to monopolize; and (3) to conspire with any other person to monopolize.

The complaint especially points out that the conduct of the defendant "tends to create a monopoly." Therefore, the basic claim of the named plaintiff concerns that part of Section 2 which prohibits the attempt to monopolize. The attempt to monopolize is distinguished from the act of monopolization in that it is not necessary for the plaintiff to show that the desired end of monopoly of power was attained. However, in all such cases to date, attempts to monopolize, where the monopoly power was not achieved, there is an additional element necessary to be shown before there can be found a violation. That ele-

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[1] *Dr. Miles Co. v. John D. Parks & Son Co.*, 220 U. S. 373;
Standard Oil of New Jersey v. United States, 221 U. S. 1;
United States v. American Tobacco Co., 221 U. S. 106;
Eastern States Retail Lumber Dealers Assn. v. United States, 234 U. S. 600;
Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441;
United States v. Trenton Potteries Co., 273 U. S. 392;
United States v. First National Pictures, Inc., 282 U. S. 44;
United States v. Colgate & Co., 250 U. S. 300;
United States v. Bausch & Lomb Optical Co., 321 U. S. 797;
International Salt Co., Inc. v. United States, 332 U. S. 392;
United States v. Columbia Steel Co., 334 U. S. 495.

ment is sometimes called "specific intent" or sometimes called "subjective intent to accomplish an unlawful result." *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594, 626-627; *Mackey v. Sears, Roebuck & Co.,* 237 F. 2d 869, 873, certiorari dismissed 355 U. S. 885; *United States v. Aluminum Co. of America,* 148 F. 2d 416, 431-432; *American Tobacco Co. v. United States,* 328 U. S. 781, 814.

There is a firm conclusion upon undisputed evidence that the defendant sells gas appliances only for the purpose of promoting the sale of natural gas which is its real business. The defendant has strong competition for the sale of its natural gas from the sale and distribution of electric energy by a publicly owned electric power distributor. The electric energy and the natural gas are generally utilized for the same purposes.

The record makes it clear that the defendant would be very happy to be out of the gas appliance business if the private dealers would use extraordinary effort to sell gas appliances. To accomplish this end, the defendant has offered to the private gas appliance dealers certain inducements. Of course, on the other hand, the private businesses selling gas and electrical appliances have no reason to try to induce people to use gas rather than to use electricity.

The uncontradicted proof reveals that the defendant has no intention to attempt to monopolize the sale of gas appliances in this area. If the plaintiff and others similarly situated are entitled to relief of some kind against the defendant, it is not under Sections 1 and 2 of the Sherman Act.

The motion for summary judgment made by the plaintiff is denied.

The motion for summary judgment interposed by the defendant is granted.

Order accordingly.

LESLIE R. DARR,
United States District Judge (Rt.)

APPENDIX D.

Amended Complaint Filed by Southern Blowpipe & Roofing Company.

AMENDED COMPLAINT.

(Filed August 19, 1966)

I.

This action arises under the Anti-Trust Laws of the United States, more particularly the Sherman Anti-Trust Act, 15 USC Sections 1 and 2, and the Clayton Act, Section 15, as hereinafter more fully appears.

II.

The plaintiff, Southern Blowpipe and Roofing Company, is a corporation organized and existing under the laws of the State of Tennessee and having its principal place of business in Tennessee and engaged in the business of selling, installing and servicing heating and air conditioning systems. This action is brought on behalf of the contractors which sell, install and service heating and air conditioning systems in the Chattanooga area, who are so numerous as to make it impracticable for all of them to join in this action, and the plaintiff will provide adequate representation of all of them. The questions of law and fact as to all of the class are common, and the claims of the plaintiff, Southern Blowpipe, are common to all members of the class.

III.

The defendant Chattanooga Gas Company is a corporation, organized in and having its principal place of business in the State of Tennessee. Its principal business is the sale of natural gas, in which business it is an authorized monopoly. In addition, it is engaged in the sales, installation and servicing of heating and air conditioning systems in and around Chattanooga in competition with the plaintiff and all other sellers, installers and servicers of heating and air conditioning systems, and much of its business is within the State of Georgia. Its business is interstate in nature.

IV.

The defendant sells, installs and services heating and air conditioning systems in competition with the plaintiff and other sellers, installers, and servicers of heating and air conditioning systems in the Chattanooga area, and in so doing provides free or below cost services on its heating and air conditioning systems, and sells and installs such systems at prices and on terms below the cost of selling and installing them, rendering competition in the sale, installation and servicing of such systems impossible.

The ability of the defendant to indulge in the practice of selling, installing, and servicing heating and air conditioning systems below cost is made possible by virtue of its legally authorized monopoly, which permits it to absorb these losses in its general operating expense, thus distributing the burden among all of its customers.

Since the plaintiff and all members of the class have no such financial advantage, they are completely at the mercy of the defendant as to which installation jobs may be available for them to bid. Competition, therefore, between the plaintiff (and others in the class) and the defendant no longer exists, because of the present monopoly power being exercised by the defendant in selling, installing and servicing heating and air conditioning systems.

All of which has caused and is causing great damage to the plaintiff, and to all members of the class, and to the public.

Wherefore the plaintiff demands judgment for damages, as provided in 15 USC Section 15; and prays for an injunction to issue providing that the defendant discontinue its illegal practices; and for such other and further relief as the Court deems proper, and demands a jury to try this cause.

APPENDIX E.

Complaint Filed by E. J. Hopton.

COMPLAINT.

(Filed January 17, 1967.)

I.

This action arises under the Anti-Trust Laws of the United States, more particularly the Sherman Anti-Trust Act, 15 USC Sections 1 and 2, and the Clayton Act, Section 15, as hereinafter more fully appears.

II.

The plaintiff, E. J. Hopton, is a citizen and resident of Nashville, Tennessee, who has since 1958, been engaged in the business of contracting for the establishment of coin-operated laundries, and the servicing, replacement of equipment, and the sale of supplies, for coin-operated laundries throughout Tennessee. Beginning in June, 1958 he contracted with various buyers in Chattanooga, Tennessee. The last of these six contracts was arranged early in 1959, but the buyer obtained a contract from the Chattanooga Gas Company on more favorable terms. From early 1959, until June, 1966, the plaintiff was unable to contract in Chattanooga because of more favorable arrangements offered by the Chattanooga Gas Company, but on or about June 1, 1966, Chattanooga Gas Company apparently discontinued the handling of equipment and supplies for coin-operated laundries, and since that date plaintiff, Hopton, has again begun to do business in Chattanooga.

III.

The equipment offered by the plaintiff has always been, and now is, designed for the use of natural gas—that is, the hot water heaters and dryers are designed to use natural gas. The equipment handled by the Chattanooga Gas Company did not include any equipment which will increase the use of gas above that of the equipment offered by the plaintiff; and the equipment handled by the Chattanooga Gas Company did include electricity powered washing machines and other equipment that did not use

natural gas, such as coin changers, water softeners, soap and bleach disposers, and other related items.

IV.

The Chattanooga Gas Company maintains a monopoly, legally authorized by the State of Tennessee, in the sale of natural gas in the Chattanooga area. This monopoly power was essential to, and was the enabling factor in the complete suppression of competition in the market for coin-operated laundries and related equipment and supplies in and around Chattanooga. This extension of the monopoly of the Chattanooga Gas Company was and is a violation of the Anti-Trust Laws of the United States, had a serious effect on interstate commerce, and caused the plaintiff, Hopton, a loss of approximately Fifty-Thousand ($50,000.00) Dollars; and defendant, Chattanooga Gas Company, could unless restrained by this Court, return to this market at any time, and on such terms as to eliminate all competitors in the Chattanooga area.

WHEREFORE, plaintiff demands:

1. That the Court enjoin the Chattanooga Gas Company from extending its monopoly into any field of endeavor other than the sale of gas.

2. That the Court give judgment to the plaintiff, Hopton, for damages in the sum of Fifty-Thousand ($50,000.-00) Dollars actual damage, trebled, by virtue of 15 USC Section 15, to One Hundred Fifty-Thousand ($150,000.00) Dollars.

3. That the Court grant such other and further relief as appears proper.

The plaintiff demands a jury to try this cause.

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202 Maclellan Building,
Chattanooga, Tennessee 37402
and
SIZER CHAMBLISS,
610 Maclellan Building,
Chattanooga, Tennessee 37402
Attorneys for Intervening Plaintiff.

APPENDIX F.

Excerpt From the Pretrial Order.

(3) ADMISSIONS, STIPULATIONS AND UNCONTROVERTED FACTS: The following facts are established by admissions in the pleadings or by stipulations of counsel at the pretrial conference:

(a) The matters set forth in paragraph (a) of the "General Nature of the Claims of the Parties" are agreed and stipulated.

(b) It is agreed and stipulated that the relevant market to the issues in this case consists of: (1) the bidding and contracting for the sale and installation of heating and air conditioning systems and related equipment in home, commercial and light industrial installations; (2) the sale and installation of coin operated laundry equipment; (3) the geographic market is the area in which the defendant, Chattanooga Gas Company, operates a natural gas distribution system in Chattanooga, Tennessee and the adjacent area, and (4) the antitrust violation alleged and the damage sought is confined to the period of four years immediately preceding the filing of the original complaint in this action upon January 7, 1964.

(c) It is agreed and stipulated that the defendant, Chattanooga Gas Company, does not manufacture any appliance, including heating and air conditioning systems and including coin-operated laundries.

(4) CONTESTED ISSUES OF FACT: (a) Has the defendant violated the antitrust laws of the United States by monopolizing the bidding and contracting for the sale and installation of heating and air conditioning systems and related equipment in home, commercial and light industrial installations in the Chattanooga area within the period beginning January 7, 1960?

(b) (If the answer to No. 1 is "No") Has the defendant violated the antitrust laws of the United States by attempting to monopolize the bidding and contracting for the sale and installation of heating and air conditioning systems and related equipment in home, commercial

and light industrial installations in the Chattanooga area within the period beginning January 7, 1960?

(c) (If the answer to either No. 1 or No. 2 above is "Yes") Has the defendant's violation of the Federal Antitrust Laws been a proximate cause of any injury or damage to the business or property of the plaintiff, Southern Blowpipe & Roofing Company?

(d) (If the answer to No. 3 above is "Yes") Damages for such injury or damage are assessed in the amount of $_____.

(e) Has the defendant violated the antitrust laws of the United States by monopolizing the sale and installation of coin operated laundry equipment in the Chattanooga area within the period beginning January 7, 1960?

(f) (If the answer to No. 5 above is "No") Has the defendant violated the antitrust laws of the United States by attempting to monopolize the sale and installation of coin operated laundry equipment in the Chattanooga area within the period beginning January 7, 1960?

(g) (If the answer to either No. 5 or No. 6 is "Yes") Has the defendant's violation of the Federal Antitrust Laws been a proximate cause of any injury or damage to the business or property of the plaintiff, E. J. Hopton?

(h) (If your answer to No. 7 above is "Yes") Damages for such injury or damage are assessed in the amount of $_____.

* * * * *

APPENDIX G.

Excerpts From the District Judge's Charge to the Jury.

Let me turn your attention then to the contentions of the parties and to the issues that are in dispute between the parties.

The plaintiff, Southern Blowpipe and Roofing Company, contends that the defendant sells and installs and services heating and air conditioning systems and bids and contracts for the sale and installation of such systems in

competition with the plaintiff and with others in the Chattanooga area.

The plaintiff avers that in doing so, the defendant sells, installs and services such systems and bids and contracts for the sale and installation thereof at prices and on terms below cost rendering competition impossible. The plaintiff further avers that the ability of the defendant to indulge in this practice is possible by reason of its legally authorized monopoly of the sale and distribution of natural gas, which permits it to absorb its losses in its general operating expenses. The plaintiff further contends that it and others engaged in the business have no such financial advantage and are thereby unable to compete. Plaintiff contends that the defendant's activity in bidding, selling, installing of heating and air conditioning systems and related equipment in homes and commercial and light industrial installations is in direct competition of the plaintiff and that the defendant has a monopoly power in the relevant market charged all in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. The plaintiff, Southern Blowpipe and Roofing Company, further contends that as a result of the defendant's said monopolistic activities, that the plaintiff has suffered damages for which it seeks to recover.

* * * * *

Let me turn your attention now to the plaintiff's contention that the defendant has monopolized the relevant market.

The word "monopolize" or "monopolizing" as is used in the statute that I have read to you and which is made illegal under the terms of the Sherman Anti-Trust Act, consists of the possession of a monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product or a business acumen or historic accident. It is the existence of a monopoly power coupled with the intent to use it for anti-competitive or monopolistic purposes or with the inevitable anti-competitive effect that establishes monopoly or monopoli-

zation as that word is used in the statute. In other words, monopolizing means to acquire or to maintain the power to exclude actual or potential competition from the field accompanied with the intent or the purpose to exercise that power. In other words, both elements must be found to exist. A monopoly violation presupposes exclusive possession or control by a person or organization or the means and practices by which if attempted the person or organization could gain exclusive possession or control of a market to the exclusion of all other actual or potential competitors. This is what we are referring to when we talk about monopoly power. Monopoly power is the power to control prices or to exclude competition. In other words, monopoly power is the power possessed by an organization to remove or to exclude competitors from the field of competition in the revelant market or the power to permit competition only upon terms dictated by the monopolizer. Now whether a company possesses monopoly power depends upon the degree of control that the company can exert upon the relevant market. The essentials of the practice of monopolization that are prohibited by the Sherman Act then are the power to eliminate competition at will or to unreasonably restrict competition and the intent to exercise that power. If the power to eliminate or unreasonably restrict competition in the relevant market has been exercised, or if as a result of the exercise of monopoly power, one or more competitors have been excluded or removed, then some actual monopolization has already occurred, but it is not necessary that competitors actually be removed or excluded from the field of competition before a party can be found to have been guilty of monopolization. Monopolization may be found to exist whenever it appears from a preponderance of the evidence that the monopoly power exists and that the intent or the purpose to use it is present. Now, you will notice that I have defined as one of the elements of monopolization the intent to monopolize. When we speak of intent or purpose to use monopoly power as an essential element of monopolization we speak

of a general intent and not the specific intent. To satisfy the requirement of intent to use monopoly power, it is not necessary that defendant have had the specific intent to establish a monopoly or to destroy competition. The required intent or purpose is present if monopoly results as the necessary consequence of what was knowingly and intentionally done. When the monopolization has been accomplished, the intent required is only the general intent or the general purpose to do the act which results in a monopolization.

Let me turn your attention now to the other theory upon which the plaintiff seeks to recover and that is the theory that the defendant has attempted to monopolize the relevant market. The term attempt to monopolize as used in the Federal anti-trust laws involves two essential elements. One is the specific intent to monopolize and the other means some act done in furtherance of that intent but insufficient actually to produce the intended monopoly. In order to find an attempt to monopolize then both elements, that is the intent to monopolize and the act in furtherance of that intent must appear and must together result in a reasonable probability that monopolization will sooner or later occur. While only a general intent is necessary to show monopolization, where the charge is attempt to monopolize, the intent shown must be the specific intent to gain control over the relevant market and to exclude competitors from that market. The specific intent required to show an attempt to monopolize is a specific subjective intent to gain a monopoly or to destroy competition.

Now, in general, business competitors are free to set their prices according to their own best judgment under the conditions of the market as they foresee them to be at the time. The very right to compete in a free market presupposes a right to lower prices in good faith in order to meets one's competitors on comparable objects or articles of manufacture. Price cutting is not wrong in itself and price cutting without more is not a violation of the Sherman Act. However, price cutting may be used in the course of a Sherman Act violation. It can become a

violation of Section 2 of the Sherman Act if it is shown to be motivated by a specific intent to drive a competitor or competitors from the field. Thus, it may be the instrument of monopoly power to eliminate competitors or to bring them so to speak to their knees, but the facts and circumstances must appear to show the practice was for the purpose and it was the intent to accomplish monopoly power. However, a pricing policy based upon sound economics is not illegal simply because it may result in the destruction of a competitor, or it is certainly not within the scope or the purpose of the Anti-Trust Laws to protect business against loss in a competitive market. One who reduces his prices in defense of his economic life and the legitimate furtherance of his business cannot be guilty of eliminating competition or his competitors even though they may suffer or they may even go out of business in competition.

Now I have spoken to you about this element of intent. Intent is the purpose or the state of mind with which a person or in this case the defendant acts or fails to act. Ordinarily it is reasonable to infer that a person intends the natural and probable consequence of acts that are knowingly done or knowingly omitted. So in the absence of evidence in the case which leads the jury to a different or to a contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act that was knowingly omitted by such person. An act or a failure to act is knowingly done and it's done voluntarily, done intentionally and not because of mistake or accident or some other innocent reason. Intent may be proved by indirect or circumstantial evidence. Indeed it often cannot be established by any other means. How witnesses may see and hear and thus be able to give direct evidence as to what a person does or fails to do. Of course there could be no eye witness account as to the state of mind with which certain acts were done or omitted, but what a per-

son does or fails to do may indicate either intent or lack of intent to act or to fail to act. Unless otherwise instructed in determining any issue involving intent, the jury may consider all of the evidence, all of the facts and circumstances which may aid in a determination of intent. Now, in this regard, plaintiff contends that the defendant has intentionally monopolized the relevant market or attempted to monopolize that market, and they cite among other matters evidence that may or may not tend to show that the defendant bid and sold upon the relevant market at a loss. The plaintiff further contends that such loss is demonstrated upon a proper allocation of promotion expenses and other expenses to their merchandising in the relevant market.

* * * * *

Chattanooga, Tennessee
March 2, 1967
1:00 P.M.

Court is duly opened.

(3:45 P.M.)

The jury has now returned in the case of Southern Blowpipe and Roofing Company versus Chattanooga Gas Company. Is there a request by counsel for a poll of the jury before we inquire as to the purpose for which they may have returned?

Mr. Foster: No, sir.

Mr. Spears: None on behalf of the Gas Company.

The Court: Gentlemen, have you been able to arrive at a verdict yet upon all issues?

Foreman: No, sir.

The Court: All right. Is there any matter in which the Court can be of assistance to you?

Foreman: Yes, sir, I have one clarification—

The Court: Be careful please in stating any proposition to the Court not to reveal the deliberations of the jury. That would not be proper, but if there is any question of law or any explanations or instructions, I'll be more than happy to—

Foreman: Sir, we would like to be clarified more on this portion of the second count, to have a better definition for us, of this portion of it for an attempt to monopolize in violation of the Sherman Anti-Trust Act.

The Court: All right.

One theory upon which the plaintiff seeks to recover is that the defendant has attempted to monopolize the relevant market, that is the heating and cooling market in the residential, light industrial and commercial field. This theory of the plaintiff, of course, is based upon Section 2 of the Sherman Act which makes it a violation of the law to attempt to monopolize. The term attempt to monopolize as used in the Federal Anti-Trust laws involves two essential elements. One is that the defendant must have been shown to have had the specific intent to monopolize; that is, that the defendant gas company must have intended to monopolize this heating and cooling market, and second, that the defendant, Chattanooga Gas Company, must have done some act in fulfilling that intent or in carrying out that purpose but insufficient to actually have produced the intended monopoly. In other words, the law distinguishes in this particular instance between having actually acquired a monopoly and intending to acquire a monopoly, and as I understand your inquiry as directed to the Court. Now just to the phase of the case that involved the allegation that the defendant, Chattanooga Gas Company, intended or attempted rather to monopolize. In order to find an attempt to monopolize, you must find both elements, namely an intent on the part of the defendant to monopolize and some act or acts upon their part in fulfilling that intent, and it must appear that together they result in a reasonable probability that monopolization will sooner or later occur. While only a general intent is necessary to show monopolization, where the charge is an attempt to monopolize, the intent must be shown to be the specific intent to gain control over the relevant market and to exclude competitors from that market. The specfic intent required to show an attempt to monopolize is a specific subjective intent to gain a monopoly and to destroy competition, so that one relevant inquiry

insofar as the second issue is concerned, will be for the jury to determine whether under all of the evidence—a preponderance of the evidence—shows that the defendant did attempt to monopolize the field and did so, and that a preponderance of the evidence shows that they intended to monopolize the field and did some act in furtherance of that attempt.

Now, does that or not answer the question that you may have had?

Foreman: Yes, sir. Could they be guilty without—

The Court: Don't reveal what your own thinking may be—that wouldn't be proper.

Foreman: Could they be guilty without intent?

The Court: The defendant, Chattanooga Gas Company, could not be guilty of attempting to monopolize the heating and cooling market in home, commercial and light industrial, which is the relevant market, they could not be guilty of attempting to do that unless they had, from a preponderance of the evidence it was shown that they intended to do just that. So it will be up to the jury to look to all of the evidence and attempt to determine on that issue what was the intention of the defendant. All right.

Now, gentlemen, when I give you these specific instructions on some phase of the case, don't fail to bear in mind all of the instructions on all phases of the case that I have given you because you should bear all of those instructions in mind in making your decision

(Jury out for Deliberation.)

The Court: All right, gentlemen, is there anything further in connection with the additional instructions of the Court?

Mr. Chambliss: Your Honor, I may be wrong, but I got the impression from the last question relating to whether or not it is possible, if the monopoly was in existence, whether it was required that specific intent also be—

The Court: Well, will you play back and see what the question was please?

(Reporter plays back portion requested by Court.)

The Court: Does that answer your question raised?

Mr. Chambliss: I'm not sure, your Honor. I had the impression at the time that he wanted to know if they could be guilty of a monopoly without intent, and it sounded like can they be guilty without intent, and I don't know whether he meant a monopoly in being or cause he meant a monopoly by attempt, and your explanation made it very clear that the explanation only applied to the attempt.

The Court: Yes, and then I also—that's the reason I added to my instruction the matter that they should bear in mind all of my previous instructions and not limit themselves just to these supplementary instructions because it was not too clear just exactly what the juror may have desired.

If there is nothing further, let's be in recess until we hear from the jury.

(Court Recessed.) Following recess:

The Court: The jury has returned in the case of Southern Blowpipe and Roofing Company versus Chattanooga Gas Company. Is there a request of counsel that we poll the jury? Before inquiring as to their verdict?

(Poll waived)

Gentlemen, have you reached a verdict in the case?

Foreman: We have, your Honor.

The Court: Will you read your verdict please?

Foreman: As to Item No. 1, We, the jury, find the plaintiff, Southern Blowpipe and Roofing Company, is not entitled to recover of the defendant, Chattanooga Gas Company, for a monopolization in violation of the Sherman Anti-Trust Act.

The Court: All right. Now is that the verdict of each member of the jury upon that first issue? Very well. Will you read your second issue?

Foreman: We, the jury, find that the plaintiff, Southern Blowpipe and Roofing Company, is not entitled

to recover of the defendant, Chattanooga Gas Company, for an attempt to monopolize in violation of the Sherman Anti-Trust Act.

The Court: Now, is that the verdict of each member of the jury upon the second issue? Very well, then your verdict—you would have no response to make on the third issue under that verdict, is that correct?

Foreman: Yes, sir.

* * * * *

APPENDIX H.

Exhibit Showing the Sale and Use of Electrical Equipment in the Chattanooga Market.

EXHIBIT D-12.

ELECTRIC POWER BOARD OF CHATTANOOGA

Electrical Appliance Sales and Residential Sales

(The Board does not sell appliances.)

PER CENT OF CUSTOMERS USING

Fiscal Year	Volume Sold By Dealers	Electric Refrigerators	Electric Ranges	Electric Water Heaters	Electric House Heating	Avg. Yearly KW-Hr. Use Per Res. Cust.
1940-41	$ 3,134,416	85.0%	48.0%	20.0%	—	2,086
1945-46	1,003,829	71.0	44.0	29.0	—	2,872
1950-51	10,448,903	96.0	82.0	60.0	17.0%	6,345
1955-56	13,920,900	95.0	95.0	71.0	33.7	10,007
1960-61	13,405,422	94.0	95.1	82.2	51.1	14,241
1963-64	13,665,771	97.1	95.4	82.8	57.9	15,876
1964-65	17,887,942	97.3	95.6	83.4	59.1	15,711
1965-66	20,185,677	98.0	97.0	89.0	60.5	16,659

Sales of Electricity in KW-HRS.

Fiscal Year	Total	Large Commercial and Power	Small Commercial and Power	Residential	Outdoor Lighting Systems
1940-41	431,914,000	325,992,000	28,228,000	75,061,000	2,633,000
1945-46	533,334,000	372,577,000	35,131,000	122,868,000	2,758,000
1950-51	1,235,130,000	802,613,000	61,116,000	367,758,000	3,643,000
1955-56	2,036,602,000	1,258,592,000	79,337,000	692,967,000	5,706,000
1960-61	2,268,299,018	1,101,093,918	84,084,097	1,075,101,344	8,019,659
1963-64*	2,773,604,795	1,310,265,219	209,490,986	1,237,735,338	16,113,252
1964-65	2,932,536,247	1,458,839,796	203,967,893	1,250,361,134	19,367,424
1965-66	3,325,065,322	1,723,061,340	217,514,845	1,362,986,683	21,502,454

Number of Customers
(End of Year)

Fiscal Year	Total	Large Commercial and Power	Small Commercial and Power	Residential	Outdoor Lighting Systems
1940-41	42,234	365	4,696	37,166	7
1945-46	49,126	457	5,199	43,461	9
1950-51	66,388	811	6,419	59,143	15
1955-56	77,752	1,196	6,396	70,126	34
1960-61	84,759	1,870	6,810	76,009	70
1963-64*	87,265	709	8,041	78,289	226
1964-65	89,649	741	8,229	80,442	237
1965-66	92,281	807	8,503	82,735	236

Operating Revenues

Fiscal Year	Total	Large Commercial and Power	Small Commercial and Power	Residential Customers	Outdoor Lighting Customers	Other Revenue
1940-41	$ 4,066,597	$1,939,463	$ 574,578	$ 1,338,929	$ 71,756	$141,871
1945-46	5,139,381	2,360,162	694,697	1,934,662	72,899	76,961
1950-51	10,053,621	4,492,281	1,111,387	4,227,673	103,275	119,005
1955-56	16,022,296	7,413,885	1,353,858	6,857,973	144,906	251,674
1960-61	19,170,637	7,702,943	1,422,290	9,570,512	206,119	268,773
1963-64*	21,391,191	7,764,668	2,544,505	10,334,005	415,101	332,912
1964-65	22,284,427	8,625,524	2,497,295	10,319,133	495,275	347,200
1965-66	24,704,503	9,964,792	2,641,322	11,146,018	569,612	382,759

* Change in rate and classification effective August 10, 1963.

Exhibit D-19

APPENDIX I.

Allocation of Sales Expenses on Sales Basis by Chattanooga Gas Company.

EXHIBIT D-19.

Line No.		1966	1965	1964	1963	1962	1961	1960	1959	1958	1957
1	Gas Sales	9,095,000	7,947,000	7,436,000	7,132,000	6,215,000	6,648,000	6,696,000	6,093,000	6,203,000	5,491,000
2	Merchandise Sales	702,000	679,000	718,000	568,000	481,000	472,000	523,000	511,000	285,000	327,000
3	Total Sales	9,797,000	8,626,000	8,154,000	7,700,000	6,696,000	7,120,000	7,219,000	6,604,000	6,488,000	5,818,000
4	Merchandise %	7.17	7.87	8.81	7.38	7.18	6.63	7.24	7.74	4.39	5.62
5	Sales Expenses										
6	Reported as Gas Expenses	172,755	201,042	160,547	135,493	144,305	130,053	118,919	118,486	134,688	125,479
7	Reported as Merchandise Expenses	156,616	159,676	135,347	113,983	93,798	90,567	103,764	116,857	86,606	95,804
8	Charge Company Work (Warranty)	5,593	8,387	7,280	6,685	5,084	5,773	4,131	3,495	2,174	—
9	Total	334,964	369,105	303,174	256,161	243,187	226,393	226,814	238,838	223,468	221,283
	Deduct Directly Related to Merchandise										
10	Bad Debts	23,600	3,600	3,600	3,600	—	3,600	3,600	3,600	3,600	2,645
11	Credit Life Insurance	2,575	2,974	3,606	2,402	2,760	2,471	2,536	3,138	1,598	2,371
12	Charge Company Work (Warranty)	5,593	8,387	7,280	6,685	5,084	5,773	4,131	3,495	2,174	—
13		31,768	14,961	14,486	12,687	7,844	11,844	10,267	10,233	7,372	5,016
14	Total to Be Allocated	303,196	354,144	288,688	243,474	235,343	214,549	216,547	228,605	216,096	216,267
15	Merchandise % (4 x 14) Line	21,739	27,871	25,433	17,968	16,898	14,225	15,678	17,694	9,487	12,154
	Merchandise Operations										
16	Net Sales	702,356	678,859	717,870	568,951	481,402	472,078	522,917	511,239	285,484	327,185
17	Cost of Sales	649,932	650,104	668,152	529,451	447,631	457,424	492,042	466,036	289,066	312,970
18	Gross Profit	52,424	28,755	49,718	39,500	33,771	14,654	30,875	45,203	(3,583)	14,215
19	Carrying Charge	23,095	16,022	21,369	18,734	22,234	19,371	22,076	23,672	28,831	32,437
20	Total Income	75,519	44,777	71,087	58,234	56,005	34,025	52,951	68,875	25,248	46,652
21	Bad Debts	23,600	3,600	3,600	3,600	—	3,600	3,600	3,600	3,600	2,645
22	Credit Life Insurance	2,575	2,974	3,606	2,402	2,760	2,471	2,536	3,138	1,598	2,371
23	Charge Company Work	5,593	8,387	7,280	6,685	5,084	5,773	4,131	3,495	2,174	—
24		31,768	14,961	14,486	12,687	7,844	11,844	10,296	10,233	7,372	5,016
25	Profit Before Allocation	43,751	29,816	56,601	45,547	48,161	22,181	42,684	58,642	17,876	41,636
26	Allocated Portion of Sales Expenses	21,739	27,871	25,433	17,968	16,898	14,225	15,678	17,694	9,487	12,154
27	Profit	22,012	1,945	31,168	27,579	31,263	7,956	27,006	40,948	8,389	29,482

APPENDIX J.

Excerpt From the Testimony of Harold Mitchell.

* * * * *

Q. All right. Now what percentage of the installations of this equipment in volume intake has the Chattanooga Gas Company installed since July of 1963—sold and installed itself? A. 7.76%.

Q. This list, I believe, that you have prepared not only shows the customer or the purchaser, user of the gas, but it shows who installed it of all the other dealers, does it not? A. Yes, sir, that's correct.

Q. So the Chattanooga Gas Company since July of 1963 has installed only 7.6% of all the commercial equipment installed in the Chattanooga area? A. Yes, sir.

Q. But, I believe you say that your salesmen have been paid their commissions regardless of who installed it? A. That's correct.

Q. It makes no difference to Chattanooga Gas? A. Yes, sir, that's right.

* * * * *

APPENDIX K.

Excerpts From the Testimony of Frank R. Callaway.

Q. All right, on the commercial and industrial jobs, they are no competition to you at all—the Chattanooga Gas Company? A. Well, it depends upon what you define commercial and industrial—now, if you're talking about commercial drug stores, restaurants, beauty shops, barber shops, small haberdasheries and such as that, yes, but not in planned and specification work or on new construction, they've not.

Q. All right. On new construction work and planned work such as architect designs or such places as

Eastgate Shopping Center, schools and new buildings—new constructions—the Chattanooga Gas Company is no competitor of yours in that line? A. That's right.

Q. So you have that field all to yourself? A. No, sir, I don't have it to myself. I've got dozens of other competitors in that field.

* * * * *

Q. All right. You don't know then? A. Don't know.

Q. All right. What about on these big jobs that you do that the Gas Company is no competitor of yours on—how do they compare as to whether they go more gas or more electric? A. Well, I imagine they're about 50-50. Of course, that's up to specifications and engineers plans where the engineer decides what's going before the ground is ever broken. That's worked out with the customer before it gets to us. We have nothing to do with selecting fuel, so one job will be gas and the next one will be electrical and so on and so forth. I imagine they're about 50-50.

Q. Those are jobs and that's the backbone of your contracting business then, isn't it? A. Well, it depends what you mean by contracting business.

Q. All right. You say that last year that you think you did about half a million dollars worth— A. That's right.

Q. —in that field. All right. What was your total overall business last year? A. A little over $1,000,000.

Q. A $1,000,000. So half of it was in that field? A. Right.

Q. And that's a field in which the Gas Company does not compete with you at all? A. They don't compete in the planned and specification jobs.

Q. Well, that's what I'm talking about.

* * * * *

APPENDIX L.

Excerpt From the Testimony of Robert Cooper.

CROSS EXAMINATION.

By Mr. Spears:

Q. Mr. Cooper, as I understand your testimony, the only reason in the world you didn't give this piece of business to Mr. Hopton was that his company wasn't agreeable to go along with your financial arrangements? A. That's right.

Q. That's all.

* * * * *

APPENDIX M.

Excerpts From the Testimony of William B. Thatcher.

A. Yes, we do, we have offices in all the principal cities of the United States.

Q. All right, can you tell us, for example, just what percentage of the utilities of America that your company audits for? A. I would say our firm is employed by over one-third of all the utilities in the United States.

Q. Have you personally been involved in the work done for these, many of these utilities? A. I have been personally involved in a number of those companies, but not all of them. Prior to the time we opened our office here in Chattanooga, I was personally responsible for the work done for the Chattanooga Gas Company and Nashville Gas Company, and prior to the merger into Atlanta Gas, I was personally responsible for the Savannah Gas work. I am presently personally responsible for the work we do for the Gas Light Company of Columbus.

Q. Would you say that it's the usual practice for a gas company to sell appliances? A. Yes, most gas distribution companies do sell appliances.

Q. Are you personally familiar with the way the Chattanooga Gas Company keeps its books? A. Yes, I am.

Q. Does it have the uniform system of accounts? A. Yes, this gas company does follow this uniform system of accounts. I think it has been discussed previously that this is a rather detailed manual of accounts. It covers instructions on how to record items in each account throughout the balance sheet and the income statement, all the income revenues and expenses. It is the chart of accounts prescribed by the Tennessee Public Service Commission for this company to follow.

Q. Do other gas companies use this same system? A. Yes, this uniform system of accounts was made up by the National Association of Railroad and Utilities Commissioners. That's the association of all the commissioners throughout the states and they made up this chart of accounts and they recommended that the various states adopt it as their own classifications, and the Tennessee Public Service Commission has adoped this classification as have the majority of the states.

Q. Has the Chattanooga Gas Company always used this system? A. To my knowledge, they have been using this chart of accounts, it was started up in 1939 when it was first prescribed and then they revised it in 1958, but if it is a regulated gas company in Tennessee, it must use this chart of accounts.

* * * * *

Q. All right. What about the costs of advertising? A. Well, of course, advertising would be a selling expense that could be related to merchandising, but then the question comes up, just how much of the advertising costs should be allocated to merchandising? I can't help but think when I see the sign "Cook With Gas" how much of the cost of that ad should go to the cost of the ranges that are sold, or the selling expense of the range, and how much should be left in the cost of selling gas sales expense, so there is this area where you must allocate costs such as advertising, either to the merchandising or to the gas.

Q. Now, on this question of allocating costs of merchandising, what do you find that this Company has

done here, Mr. Thatcher? A. Did you ask on the costs of advertising?

Q. No, allocating—promotional expense to merchandising. What has the Company done? A. Well, this Company has a rather arbitrary method of allocating its costs. Mr. Kidd and I have discussed this in prior years, and he and I have had some differences of opinion as to the total amount, but I think that I should point out at this time that it makes no difference whatsoever as to this allocation as far as the effect on total sales expense is concerned. Under this chart of accounts, there's a major classification and operating expense called sales expense. Now, of course, this is an operating expense for a gas company. There are eight major classifications of expenses and this is the seventh one and this classification is "sales expenses." There are six accounts under sales expenses—supervision, demonstrating and selling expenses, advertising, revenue from merchandise sales, cost of merchandise sold, miscellaneous sales expenses—those six accounts are included in the total sales expense, so when I say it doesn't make too much difference how they allocate these expenses, it has no effect whatsoever on the total sales expense. For instance, if they spent $100 on advertising, they could allocate $50 to merchandising and $50 they could leave as a gas expense, but it still adds up to $100 total selling expense. They might only allocate $10 to merchandising and leave $90, but they still add up and are shown as one expense, sales expense, so regardless of the allocation used, the total expense is not affected.

Q. Now, let me ask you this. Are you familiar with the promotional expense of utilities? A. Yes, I am. Every utility incurs advertising and selling expenses.

Q. Do you know of any public utility that your company audits, or that you have handled personally, that doesn't have a promotional expense involved in it—for the sale of its product? A. Every utility that I know of has selling expenses.

Q. Now, let me ask you this. What have you found to be the average percentage-wise of the total of gross sales

—within what range do they run for promotional expense for the utilities that you have handled? A. I'd say the average would be a little over 3 percent—probably 3.1 percent.

Q. Have you checked here with the Chattanooga Gas Company as to the promotional expense that they have which we've been talking about, the total of it? A. Yes, their total sales expense amounted to $259,000 against sales—gas sales of $9,095,000—I don't have that before me, but I believe it's less than 2½ percent, sir.

Q. From your experience as an auditor in the public utility field, do you find that this is an entirely reasonable promotional expense charged for the sale of natural gas by the Chattanooga Gas Company? A. Well, this promotional expense varies considerably, depending upon the competitive market in which the utility finds itself, and there was one company where the utility commission has ruled that 3.85 percent was found to be reasonable. In other areas it might be less where the competition is not quite so great, but certainly the 2½ percent would be considered reasonable in this case.

Q. Let me ask you this. From your experience in the utility business, with Arthur Andersen & Co., have you ever run into a situation where a gas company has more actual competition from electricity that it does in this market? A. The competition here in Chattanooga would be considerable. I think that Chattanooga is known as the electric center of the world, etc. and they pride themselves on the cheap electricity, and it would be an extremely tough competitive situation. I can't think of any other area of the United States where the competition would be any worse that it is here for a gas company.

Q. Now then, this promotional expense that we're talking about of $259,000 that we've been describing here, is the expense that you have referred to as allocating here to these appliance sales. Am I not correct? A. The $259,000 is the net sales expense. In the gas business, you always refer to net sales expense because there's always the gross profit of merchandise in there, so in the gas in-

dustry sales expense is usually referred to as net sales expense, and in this case the $259,000 is the net sales expense. Now, if you look at the total sales expenses before merchandise is sold, the company reported $173,000—I'm rounding here—$173,000 was reported as selling expenses as gas, and $157,000 was reported as selling expenses as merchandise, for a total of about $329,000 of selling expenses incurred by the company. Now of this $329,000 a portion of that would be directly related to merchandise such as your bad debt expense and credit life insurance expense. If you remove those from this total selling expense, the amount left to be allocated between merchandising and gas actually amounted in 1966 to $303,000, and as I said previously, the company allocated a total of $157,000 to merchandise of this $303,000.

Q. Could this have been allocated perfectly legitimately in another way? A. Yes, there are many ways that selling expenses could be allocated. I would think a very reasonable way to allocate these expenses that cannot be directly related either to merchandise or gas would be on the basis of total sales. Just as an example, this company had sales of gas of $9,095,000 in 1966; they had merchandise sales of $702,000 for a total sales of $9,797,000. Now of that total, the merchandise was a little over 7% of total sales, so it would be an acceptable method to allocate these indirect selling expenses to take 7% of them and allocate it to the merchandising since of the total sales, merchandise amounted to only 7%.

Q. Mr. Thatcher, why is it necessary for this company to continue to have to advertise and push its product in this market? Could you tell us that? A. This company must advertise just like any other company that's trying to increase its business. I think it's definitely in the public interest as far as a public utility is concerned to advertise because if it can increase its volume of sales, then it could lower its prices, if it could increase the volume substantially enough.

Q. I think we've covered this once, but let's just cover it very briefly—what kind of rate structure does

this company purchase its gas supply from its suppliers on? A. The company contracts with its supplier for what they call a demand factor—at present I think it's 39,000 mcf is their contract demand—during 1965 and 1966 I believe it was 40,000. Now when they contract for this demand, that means that they must pay a certain amount, whatever they contract for. That's just very similar to a minimum charge on a bill. In the case of the 40,000 demand which was contracted for during 1966 at their demand charge rate of $3.25, amounted to $130,000 each month that they had to pay for gas whether they would use any gas or not.

Q. If they didn't sell a foot of gas that month, they had to pay that, didn't they? A. That's what they contracted for, right.

Q. Now, what is their commodity— A. Well, in addition to this fixed charge you might say of the $130,000 each month, they pay for what they call a commodity charge or the volume that is used, and of course this is at a much lower rate than the demand charge. I think it amounts to about .25¢ for the commodity—.26¢.

Q. Now then, the cost of gas to the company depends then on the load factor that it creates with its supplier, is that not true? A. That's right. It's paying for this demand factor of the 40,000 mcf, and of course demand is the total amount that goes through at any one time. It's the greatest use at any one time. They pay for that demand factor so if they could, of course, keep their volume right up to that demand, well then their unit cost per mcf would be lowered considerably. In fact, that happens during the summer when the volume is down at a low point. The average unit cost for gas becomes much lower—rather much higher when the usage is down. Unit cost of the gas is higher than during the winter, for instance, when the volume keeps going through and of course the average cost comes down since there is this differential.

* * * * *

Mr. Spears: Now, I'd like for you to make this an exhibit to your testimony.

Court Reporter: Exhibit 19.

Q. Now, Mr. Thatcher, will you explain to the Court and the jury this cost allocation that you have made—

The Court: Just a minute—we already have an Exhibit 19—Exhibit 20.

Q. —at my request and what it shows and just go right on down to it. A. It just merely demonstrates the allocation of these expenses using the sales basis as a method. The first two numbers, lines 1 and 2, show the total sales of gas and merchandise and line 3 is the total sales. Line 4 is the percentage of merchandise sales as to total sales, and then the next few lines are the company's sales expenses, reported as gas expense, $173,000; reported as merchandise expense, $156,000 and we have this charge company work, which I mentioned is sometimes referred to as warranty work and any defective parts go into that, but a lot of it is going out and repairing the gas lines. That's a total of $335,000 sales expenses. From that should be deducted the sales expense directly related to merchandise. The bad debt expense is certainly directly related to merchandise, credit life insurance expense, and again this charge company work. I'm saying that that is directly related, or it should be excluded from total sales expense, to the total to be allocated is $303,000. Now the portion of that to be allocated to merchandise would be, up above, the 7% and in this year 1966, $21,739, would be an acceptable method of allocating such indirect expenses. Then, down at the bottom, you could restate the merchandise operations by showing the net sales of $702,000 and cost of sales of $649,900, gross profit of $52,424. Add to that the carrying charge income of $23,000 to arrive at a total income of $75,500. From that would be deducted bad debts which are directly related of $23,600, credit life insurance, $2,575, and this charge company work of $5,593, and leaves $31,768 to cover the portion of expenses that might be allocated to merchandise, and in this example we have allocated $21,739 to the merchandise, leaving a profit of $22,000. As shown above, the

Company has actually allocated $156,616 or nearly 48% of total sales expense to its merchandising.

Q. Now, do these figures down the line there show the same thing for years back? A. Yes, the very same thing.

Q. Now, Mr. Thatcher, can you think of any reason in the world from your experience why a utility in this market—a gas utility in this market—would want to limit in any respect the number of people selling appliances for gas? A. No, I can't imagine—there would be no reason at all.

Q. The main purpose of this company it to sell natural gas? A. That's its primary business and it received a franchise to sell gas.

Mr. Spears: That all—wait just a minute. I want to ask you one further question.

Q. Assume for a minute that the company quit selling appliances. What would happen to this promotional expense? A. Well, as I said earlier, this total sales expense incurred by the company is a net sales expense. It has been reduced by the gross profit on the sales of merchandise, so if they were to quit selling merchandise, their selling expense would be increased by—in 1966—by $43,751. It would be increased in 1965 by nearly $30,000 and so on down. This gross profit is applied as a reduction of the gas sales expense.

Q. And I believe you say that in your opinion that 2½ percent of gross sales of gas is entirely reasonable for promotional expense? A. Yes, it is. I think that if they were to stop selling merchandise, undoubtedly the advertising and other sales efforts would have to be increased.

* * * * *

APPENDIX N.

Excerpts From the Testimony of Inman Kidd.

* * * * *

Q. Are you now second in command only to Mr. Greenberg, the President of the Company at this time, the Chattanooga Gas Company? A. I am, sir.

Q. Now, are you familiar with the policies and programs that the Chattanooga Gas Company has followed over a period of years in regard to sales of appliances and the promotion of the sales of gas? A. Yes, Mr. Spears. I followed very closely the various promotions and particularly the promotions in regard to the sale of gas and have had a knowledge—a working knowledge of the policies being followed.

Q. Now, let's go back a little bit. Prior to 1950, what kind of gas company was this and what kind of gas did it sell? A. Chattanooga Gas Company prior to 1950 was what we would term a manufactured gas company. We had a supply of gas which was made from by-products, from actually the Tennessee Products Company as it was then known—we called it coke oven gas. It was limited in supply to the amount that could actually be produced by this particular plant located here in Chattanooga and the total supply at that time was quite limited as compared with the availability of gas after we changed to natural. There is a slight difference in the quality of the gas; the coke oven gas is rated at about half of the heating content of natural gas.

* * * * *

Q. Now, at the time that natural gas got here, what was the dominant fuel being used in this area and where did it come from? A. The dominant fuel at that time was electricity and it was supplied by the Electric Power Board.

Q. Of the City of Chattanooga? A. Yes and supplied, of course, by Tennessee Valley Authority.

Q. Now, of course this Power Board is a public service—wholly-owned subsidiary of the City of Chattanooga, is it not? A. Yes.

Q. And I think it's elemental, but as such it pays no income tax, is that correct? A. That's correct.

Q. Now, does the Chattanooga Gas Company have to pay an income tax? A. Yes, sir, we are subject to the corporation income tax.

Q. All right. Now, at the time that natural gas came here, could you tell us approximately the number of homes in this area that were heated by natural gas? A. There were around approximately 4,000—at most, three to four thousand.

Q. Now then, when natural gas arrived here, did the Chattanooga Gas Company start out on a program to try to promote the sale of natural gas? A. Yes, it did.

* * * * *

A. Well, the company of course first of all set up a program for cooperation with dealers. It furnished men who were qualified to go out and assist in the engineering and planning of the changeover. Chattanooga Gas Company first of all had to absorb all of the expense of changing over its customers' appliances from the manufactured gas to the natural gas.

Q. All right, just let me interrupt you there for one second. Is it true that the appliances that burned the by-product gas would not necessarily burn the natural gas? A. Not without a specific conversion which required an expense that the Chattanooga Gas Company furnished.

Q. All right. A. And Chattanooga Gas Company had heating engineers, it had sales people. It turned all of its efforts of its sales department toward generating new business and generating new customers and also the sale of appliances because the end result of this is the increased quantity in the use of gas.

Q. Is there any way in the world that you can sell your product if you can't sell appliances first? A. No, sir, the gas can be used only as far as the residential is concerned to appliances. Commercially it's used through appliances. There are some industrial applications for it and some of these are actually used in the same nature as an appliance, but there is not a single solitary thing with the possible exception of some industrial applications, that gas is used for that some other fuel or electricity or coal would not do. Gas is an alternate in the minds of every person from a residential standpoint.

* * * * *

Q. (By Mr. Spears) Now, Mr. Kidd, by agreement with these gentlemen, I want to give you these two documents here and ask you, if you will, to state what they are and what they show. I might say to the Court that these two documents are in by agreement as far as their authenticity is concerned but not their relevancy, if your Honor please, and—do you want to tell us what they are, Mr. Kidd? A. This is a copy of a letter of the Sales Manager of the Electric Power Board under date of October 6, 1965, which states the policy under which the Electric Power Board will install underground distribution systems to residential subdivisions.

Q. All right. A. This is a summary made from our knowledge of certain participation allowances and promotion allowances effective from the Electric Power Board.

Q. All right. Now suppose you tell us some of the inducements that the Electric Power Board offers to either the dealers or the homebuilders if a man wants to go on electric and build a home? Can you just read those? A. This is a hard copy to read—if you'll pardon, it's a little difficult to read—"In residential subdivisions where the soil is reasonably free of subsurface rock, the Power Board will, where the houses are to be all electric, including electric heating, install an underground distribution system exclusive of secondary service to the house at a cost to the developer of $4.00 per front foot of lot. The cost of $4.00 represents the present average difference in cost between overhead and underground systems of this type. The developer is expected to pass $2.00 of this expense on to the purchaser, but the Electric Power Board will refund to the developer $2.00 per front foot. The Electric Power Board will also furnish to the builder, free of charge, cable duct for the service to each house, but to be installed by the builder, worth approximately $200 to $250. The Electric Power Board is therefore refunding a cash value to the developer and the builder or owner of approximately $450."

Q. All right. Now, what does the other sheet show? A. Now, the other sheet shows a record of certain promotion allowances, for example, in commercial water

heating and cooking, for the first 5 kw installed, there's an allowance of $5.00 per kw. For the next 5 kw installed, $4.00 and all excess at the rate of $3.00. For apartment projects, there is a cash allowance to customers of up to $150 in an apartment and there are $50 allowances for various appliances that might be installed.

* * * * *

Q. All right. Assuming that a person comes to you and says that they want natural gas from you—I don't care whether it's for house heating or factory or commercial, a big coke oven—I don't care what it is, but he doesn't want to buy his appliances from you. Where else can he get them? A. He can obtain his appliances anywhere that he chooses; it doesn't make any difference to us where he gets them. We're interested in serving him gas; we're required to serve him gas.

Q. All right. Does the Chattanooga Gas Company have a single, exclusive arrangement with any appliance that they sell from any dealer? A. No, sir, not to my knowledge and understanding. I think there has been one in question, but my interpretation of even that one is that it has not. There's one here that was mentioned in connection with Speed Queen, but to my knowledge that has never been interpreted as an exclusive one.

Q. In other words, anybody in the City of Chattanooga can sell the same appliances that you sell? A. Right.

Q. Let me ask you this. Have you had occasion, time and time again, when some of these dealer customers have made sales and need appliances, they call you up and order your appliances—how do you sell them to them? A. When a dealer wants an appliance from us?

Q. Yes, on a job that he's sold. How do you sell it to him? A. We'll sell it to him right out of our stock at what it costs us plus a reasonable markup to cover our costs of handling it.

Q. Have you ever refused to do that? A. To my knowledge we never have.

Q. As a matter of fact, you're delighted to do it, aren't you? A. Delighted to do it, and as a matter of fact, I specifically know that we have done it on occasions for Southern Blowpipe.

Q. Let me ask you this. I think it's obvious, but can any person in Hamilton County that can buy gas off your lines, can they also buy electricity, oil or coke? A. Absolutely.

Q. And is that what you're in competition with in this area? A. Yes, we're in competition with all fuels that anyone can use.

Mr. Spears: I believe that's all.

* * * * *

APPENDIX O.

Excerpts From the Testimony of Edward F. Davis.

* * * * *

A. Edward Francis Davis.

Q. And you're employed, of course, by the Chattanooga Gas Company? A. Yes, sir.

Q. And in what capacity? A. As sales manager.

Q. And how long have you been with them? A. I've been with them 16 years, since 1950.

Q. Now, I want to take up with you as sales manager, if I may, some of the things that the Gas Company has done in an attempt to help people who sell appliances, of all kinds and descriptions. Now, can you tell us, for example, what the Chattanooga Gas Company does for people who install central heating and air conditioning equipment and just the contractors who are in that business as far as engineering assistance is concerned. Now, what do they do? A. Well, we have always provided a service of surveying a house and this is a technicality where you go out and measure up the house to determine the heating and/or the cooling requirements. It generally takes several hours of work to measure this thing up; then we calculate the requirements after we bring this back to the office, and determine the

size of equipment that ought to go in—the size of the heating equipment and the size of the cooling equipment. We then will provide upon request to customer or dealer the heating estimate, the cost of operation of the heating system, for the winter. If it's gas cooling, we would estimate the cost of gas cooling—we do not attempt to make estimates on electric cooling. We will design ductwork systems for any dealer; in fact, practically all of our work, or a big part of our work in engineering right now is designing duct systems and layout on paper for any dealers—most of it, however, is for new homes. If we are requested to do it for an old home, however, we will do this, too. When the systems are installed, and here again on request—we just don't go out to every job after it's been put in—but if the customer or dealer is having some problem with his system, like the air is not getting to certain rooms, we will go out and attempt to do what we call "balance the system" which is getting the heat flow evenly throughout the house to have a satisfied customer. We just about bend over backwards ourselves to solve our customer's problem and in turn help the dealer, too. For example, there are a lot of times that a customer will come to the Gas Company with his problems where he won't go back to the dealer. There may be problems of public relations back and forth or what not, but we try to help them solve the problems theirselves.

Q. Now, Mr. Davis, these services that you speak of, that the company renders to these dealers, is that done free of charge? A. Yes, sir, there is no charge whatsoever for any of this work.

* * * * *

Q. Now then, do you also run a school there for these people to train their installers on this equipment? A. We have run schools back in the early stages—again back to '55 to '60; we have conducted schools on proper venting—this is a big—I'll call it, if I may, "bugaboo" in our business—that every gas appliance has to be vented to the outside, and it creates many difficulties, and we have had people in to conduct venting schools and to conduct piping

schools. Now, just recently—I think it was last year—we went back to these schools because here again you have a turnover in workmen in dealer operations—new men who do not know exactly what they are supposed to do—so we had a re-training, if you may call it that, of the dealer operation in the venting. We get a man in from this manufacturer who is an expert in the field and know most anything they say is accepted by the American Standard Association, and we have conducted schools in piping, sizing—this is another problem that we frequently encounter, and this is a little bit embarrassing, but we actually got in the electricians for training school in wiring and controls, because no system is any better than its control circuit will provide, and as a result many things go wrong, products change in the way that you wire them, so we've actually conducted schools for electricians. Going back again, when these dealers had sales forces—I mean large sales forces—we actually conducted sales training schools for these salesmen. They were new in the business and new particularly in the field of gas. This was another thing—our job is to sell gas and anything we can do to help we do.

Q. Can you tell us, for example, what you did in the field of bonuses and incentives for these dealer people? A. Well, back again we actually paid for two or three years—I know of two for positive—that we actually paid them a bonus for each gas heating sale—a cash bonus—

Q. Now, you're not speaking of your men? A. No, we paid dealer salesmen, whoever sold the job. We also matched a pot in this bonus promotion, and the dealer who in turn sold the most was entitled to a share of the pot. Now we recently have advertised and promoted TV stamps for new gas heating customers. This was done first with realtor management concerns—people who manage real estate property and keep it up for owners—and we made an arrangement with them for whatever they would put in in the way of gas heating on a permanent basis—it would stay there—that we would pay them something like 10,000 TV stamps. This was done and we paid TV stamps to these people for putting in gas regardless of who

put them in, and in the case of the realtors, there were 23 out of 33 installations of gas heating that were done by others that we paid stamps for and we did not sell the jobs ourselves. Recently we have continued the TV stamps to customers and have paid—this is not now real estate—but any prospective interested party. We pay TV stamps to them regardless of where they bought equipment, and I think last year we paid about 9 out of 28—something like that—to purchases made from others. One incident that I can remember, we gave 10,000 TV stamps to the Boy Scout Building over on Third Street who converted from electric to gas and Southern Blowpipe did the job. I won't say that that's what sold the job, but it was an inducement that certainly shouldn't be bypassed. On new homes, if I may change to a market that's a little different—we have over the past three to fours years had a program going with dealers for installing gas heating in new homes. They sell and install the gas heating for new homes. Two years ago we offered prize points, merchandise prize points, where you get a catalog and you earn so many prize points, and in turn you take these points that you've earned and send them in for merchandise. This was applicable to all dealer sales. This year we're going to take them to Acapulco. This is a promotion where based on the number of new houses they install—sell and install gas heating in—they will be entitled to a trip to Acapulco, New Mexico. They have to earn a certain number to get there but they also can buy the difference that they don't earn and go anyway.

Q. Now all of this doesn't depend on the buying in any respect of their appliances or anything from you? A. No, it makes no difference. This is a dealer promotion. It is a payment to dealer. We also have one that goes to a builder but this is not related. It makes no difference again whether it is purchased from us or not. Now I would like to mention one other thing in the way of bonuses and incentives—we pay our own salesmen a bonus for the procurement of a new gas heating customer, and this again is done regardless of by whom it's sold or how it's procured.

Q. Now then, can you tell us what your practice is as to passing on prospects to these people so that they can work them, people like Mr. Steakley that testified here. What is your policy on that? A. Well, we have to work with these people because they are helping us do a job, and those that help us do a job we try to help in every way possible. The prospects—Mr. Steakley works to a great degree in new homes, but that work is done with Mr. Prince and I think he'll testify as to how they handle the prospects there. Other prospects—back again when the co-ordinator was working with these dealers in '55 to '60, we actually passed the prospects right on to the dealers. As we heard of people who wanted to change to gas, we would pass them along one dealer at a time sort of on a rotation basis to be as fair as we can. Now as recently as last summer, one of the dealers came to me looking for air conditioning prospects and I went through some 400 gas furnace customers, who purchased gas furnaces, and provided him with a list of these that he might sell electric cooling to. Now that isn't exactly kosher, but when you have to work with these people, you try to do what you can to help them and to keep them working for you.

* * * * *

A. Well, may I explain our pricing into the question?

Q. All right. A. We price our jobs by taking—and I'm talking for a moment about existing homes—we price these jobs on the basis of all installed costs. This includes the equipment, the freight, the delivery, the sheetmetal man's bid, and any other sub-contractors that we must hire, and from all of this installed cost, we mark it up to have a 35% profit on the selling price.

Q. Now, does the company ever purposely bid a job or figure a job to lose money on, Mr. Davis? A. We have never intentionally figured any job to my knowledge to lose money. Now in this heating and air conditioning business, just about every job you do you have to make estimates on. The only thing that we have found to be fairly safe is just installing furnace work—we can generally figure those out ahead of time without too much

work—but when you get into heating and air conditioning, all kinds of things are involved and each case has to be figured on its own and we have to figure what all of these things are going to cost, to get sub-bids to do this work, and then make our price from there, but we never intentionally price it below these total costs that it takes to do the job.

Q. Can you tell us what happened as far as the volume of replacements in the home market when natural gas first came to Chattanooga? A. Well, when they introduced natural gas in May or so of 1950, during that first year the request and demand from the public were tremendous. As I recall the figure, there were some 2,700 gas heating units installed in the City of Chattanooga that first year. Basically, I think this is a normal reaction from the conversion from fuel that we were limited in supply of to natural gas. It happens every place else in the country, and in addition to that we had certain post-war demands—this, of course, was five years after the war.

Q. Now, what happened after about two or three years on that situation? A. Well, the next year the sales dropped to about 1,300 units as you might anticipate the demand falling off a bit; the year following it stayed at about 1,300 and then in 1953 the sales of heating units dropped to about a mere 430 or so. These are all types of gas heating units I'm referring to in number.

Q. Did the home market—what was its condition as far as the Gas Company was concerned—what kind of growth did you show for the next four or five years in the home market in the Chattanooga area? From about '53 or '54 to '59 or '60? A. Well, may I go back to the 1950. It was the first year when we brought natural gas in. We acquired something like 1,500 customers just overnight, and the next years we about stayed even. Now from the period of about '54 to '60 the Gas Company didn't show any residential customer increase whatsoever. There were some years where we would gain 100 customers and the next year we'd lose 200. It was just up and down in the total growth over about six or eight

years there up until 1961 or '62—and finally the curve actually turned off in '60 to fall to where we started losing customers—but this was the period of the urban renewal on the west side, if you'll remember, took about 1,400 of our customers and then the interstate highway program began to tear down our customers, too, so for the period of '54 to '59 there was no growth whatsoever. For the period then from '59 to '61 or '2 we were on a downhill in losses of customers resulting from these things I mentioned.

Q. Now, around '60 or '61, can you tell us just briefly—I'll cover it a little more with Mr. Prince—what the company began to do in the new home market? A. Well, I'll pick up, if I may, with about 1961 or early '62 where we finally talked some builders into putting gas in a project in Forest Plaza out here near Highland Plaza Shopping Center.

Q. Let me interrupt you there—one thing, Mr. Davis, up until this time that you're speaking of, had the Gas Company been able to penetrate the new home market to any degree in the City of Chattanooga? A. Practically nothing.

Q. All right. Go ahead. A. We got our mains put into this project at Forest Plaza and we managed to get some dealers installing heating and air conditioning—gas heating and electric cooling—this is a prominent part of today's market; I need to point out that heating and cooling goes into 70% of the new homes that are built. When we got to this point, the problems that these builders encountered in installing equipment and getting the jobs finished and satisfying these builders got to the point where these boys said, well, you can either find someone else to do this work, do it yourself, or we're going to go to an all electric home again for the rest of this project. Now, we had installed about $20,000 worth of mains in this subdivision that, in my opinion, deserved protection for the sake of our stockholders and our rate payers, and so we at this point made a decision that we would go on and install central heating and cooling and protect what we had. Now this project was a success in this sense—that it

started a developmnet of projects all the way up and down the hills of Red Bank and White Oak up through there—where we're acquiring gas heating in about 70% of the homes that are being built in these sub-divisions we pipe. Now this business grew quite rapidly. We did some 20 to 30 homes the first year and then we got up to 120 the next year and nearly 200 the year after. At this point we were still seeking people to help and do, and we found some sales allies who got on the bandwagon with us—these sales allies had been selling electric heat pumps which wasn't helping us, but we enlisted their support and got them to go along and put in gas heating.

Q. Has this company, Mr. Davis, ever in any respect tried to limit the number of dealers selling gas appliances, central air conditioning, heating or anything? A. No, sir, we have not. If anything, I'd say that we have tried to encourage any and every dealer.

Q. Let me ask you this. Does this company have an exclusive arrangement with any appliance of any kind or nature that we sell? A. No, sir, we have never to my knowledge had any exclusive franchise agreements or even asked manufacturers not to sell to anyone else.

* * * * *

APPENDIX P.

Excerpt From the Testimony of Raymond Steakley.

Q. And Mr. Steakley, speak out plain here so these gentlemen on the jury can hear you. What business are you in? A. The heating and air conditioning business. Smith Air Conditioning Company, Inc.

Q. Are you the president of that company? A. Yes, sir.

Q. How long have you been in this heating and air conditioning business? A. Approximately 10 years.

Q. What—do you install both gas and electric heating and air conditioning? A. Yes, sir.

Q. How does the proportion run as between electric and gas on your installations over the last four or

five years? Just roughly speaking? A. I'd say electric 4 to 1 over gas.

Q. Now, did you make various installations last year of gas furnaces and combination gas and electric air conditioning units? A. Yes.

Q. Can you tell us how many of those that you made? A. I'd say roughly 104 gas installations.

Q. And how many electric installations did you make last year? A. 475.

Q. Now, can you tell us, of those 104 gas installations you made, where did you get those prospects from and in what respect did the Chattanooga Gas Company assist you, if they did, in these jobs? A. Well, in 1965 Fedders came out—that's our main line, and they came out with the gas equipment—prior to this I never installed any, so—

Q. Do you handle the Fedders? A. The Fedders main line. Yes, sir, we're exclusively Fedders, and they came out with gas equipment and they asked us to merchandise the whole—the full line, in other words—so the Gas Company assisted me in designing the systems and they brought me—in other words, their engineers would lay out a set and then they'd bring me a set of prints and I figured the equipment and the ductwork and the gas piping and the entire job.

Q. Did they go so far as to send you prospects that they knew were interested in gas? A. Yes.

Q. What percentage of these 104 installations that you made last year would you say were sent to you or made possible by the efforts of the Chattanooga Gas Company? A. I'd say approximately 75%

Q. Now, on this service that they gave you on layouts —what do you mean—explain? Now some of the jury know that and some of them don't. What do you mean on these layouts? What is that? A. Well, for each central installation you have to have a duct system to distribute the air, etc. and each piece of equipment will deliver so much air, so they design your duct system and they draw it on a floor plan of the house and show you where to position each register outlet and return—

Q. Now, do they charge you anything for this? A. No, sir.

Q. This is simply a free service that they render to you as a dealer in helping you to get into distributing gas? A. That's correct.

* * * * *

APPENDIX Q.

Excerpt From the Testimony of Milton Daugherty.

CROSS EXAMINATION.

By Mr. Spears:

Q. Mr. Daugherty, now I understand that you and your brother are in the main business of selling oil, am I correct in that? A. Primarily, yes.

Q. That is primarily your business and you sell heating equipment to encourage the use of oil? A. Naturally.

Q. Now then, do you all work up a package deal for a man when you go out to bid for him and you want him to switch to oil? A. Well—

Q. Would it cost him to install oil burning equipment? A. What do you mean by package deal?

Q. Well, do you go to him with a bid as to what it would cost him over all to install your equipment? A. Yes, to install the equipment.

Q. Now your main purpose originally is to sell oil, isn't it? A. I would say primarily, yes.

Q. And this is an incident to helping you sell oil that you sell these oil burning appliances? That's correct, isn't it? A. Of course.

* * * * *

APPENDIX R.

Excerpt From the Testimony of Preston Maddox.

Mr. Spears: That's all. Oh yes, let me ask you just one thing. Has Southern Blowpipe and Roofing Company ever approached you about installing anything in any of the homes that you build?

A. No, sir.

Q. Never since you have been in the business? A. No, sir.

* * * * *

A. Of course, all of them were not gas, some of them were electric.

Q. Has the Power Board ever bidded a job to install heating units or air conditioning units for you? A. No, the Power Company doesn't bid the jobs themselves, they pick—they come by and solicit your business to use electricity and they will do your heating layout for you and they will take your plans and get bids for you.

Q. But they turn all their jobs over to the private contractors. Is that correct? A. Yes.

Q. Thank you. That's all.

* * * * *

APPENDIX S.

Judgment of the District Court.

JUDGMENT.

(Filed March 6, 1967.)

This action came on for trial before the Court and a jury, the Honorable Frank W. Wilson, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Chattanooga Gas Company, recover of the plaintiff, Southern Blowpipe and Roofing Company, its costs of action.

Dated at Chattanooga, Tennessee, this ____ day of _____, 1967.

KARL D. SAULPAW, JR.,
Clerk of Court,

By: J. ROBERT DALE,
Deputy in Charge.

APPENDIX T.

Excerpt From the Testimony of Bobby Dixson.

* * * * *

(454) Q. Has the Southern Blowpipe here, to your knowledge ever solicited any homes from you? A. No, sir.

Q. That's all.

* * * * *

APPENDIX U.

Excerpt From the Testimony of Paul Walker.

* * * * *

(467) Mr. Spears: That's all. No, I have just one other question.

Q. Has any representative of Southern Blowpipe and Roofing Company ever called on you soliciting you for any of your business? A. No, sir.

Mr. Spears: That's all.

* * * * *

APPENDIX V.

Excerpt From the Testimony of Harrell Case.

* * * * *

(490) Q. That's all. In all due respect, has Southern Blowpipe and Roofing Company ever solicited you to do any of your homes? A. No, sir.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 304

SOUTHERN BLOWPIPE & ROOFING COMPANY
and E. J. HOPTON,
Petitioners,

v.

CHATTANOOGA GAS COMPANY,
Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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In its statement on Jurisdiction the respondent has asserted:

> "2. The respondent asserts that the sole question represented by the petition presupposes or assumes a factual situation which the trial of the case showed to be non-existent, and that this Court is without jurisdiction to consider a hypothetical question when a ruling would not affect the rights of the litigants."

This statement is incorrect. The District Court held that the Gas Company was operating as a monopoly—was

already possessed of a legal monopoly. This question was not presented to the jury. The proof was undisputed that the Gas Company was operating in the relevant market of the plaintiffs. The question was, then, can a monopoly operate in a separate competitive relevant market without carrying over into that separate market its monopoly power.

On page 22 of the respondent's brief the question is made clear. It is pointed out that an essential element is:

> " * * * (1) the possession of monopoly power in the relevant market * * *"

The respondent then states:

> "The jury and the two lower Courts have found that there is no monopoly in this case."

The difference between "monopoly" and "monopoly power" is thus glossed over. The petitioners did not, and could not, prove that the Gas Company had both monopoly power and intent to exert this power in the petitioners' relevant market, both of which, by the charge of the District Court, were essential to establish a monopoly. *The jury did not find that "monopoly power" did not exist.*

The contention that a ruling on this question would not affect the rights of these litigants ignores the fact that had the plaintiffs' motion for a directed verdict been granted, as a correct answer to the question presented requires, the plaintiffs would have prevailed and received both injunctive relief and substantial damages.

Respectfully submitted,

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September 6, 1968.